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No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

**FRED RICE,**

*Petitioner,*

vs.

**JOHN AURIEMMA, et al.,**

*Respondents.*

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

# APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1479

JOHN AURIEMMA, DANIEL COLL,
MARSHALL CONSADINE, RENALDO COZZI,
KENNETH CURIN, RUSSELL DITUSA,
THOMAS FARAGOI, LAWRENCE FORBERG,
JOHN HINCHY, KATHRYN KAJARI,
GEORGE MARCIN, PATRICK MCDONOUGH,
WALTER MURPHY, JOHN RAFTER,
DOMINIC RIZZI, JAMES STAMPNICK,
THOMAS WALTON and ROGER WHALEN,

*Plaintiffs-Appellees,*

*v.*

FRED RICE,

*Defendant-Appellant,*

and

CITY OF CHICAGO,

*Defendant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1224—**James F. Holderman**, *Judge.*

ARGUED SEPTEMBER 11, 1989—DECIDED FEBRUARY 6, 1990

Before BAUER, *Chief Judge*, WOOD and FLAUM, *Circuit Judges*.

FLAUM, *Circuit Judge*. This case was brought by eighteen white police officers of the Chicago Police Department who claim they were demoted based on race in violation of the equal protection clause of the fourteenth amendment, and 42 U.S.C. §§ 1981, 1983, and 1985(3), by defendant Fred Rice, former Superintendent of the Chicago Police Department. Rice filed a motion for summary judgment based on qualified immunity which was granted with regard to plaintiffs' claims alleging political discrimination and retaliation (for actions taken before June 11, 1984). However, Rice's motion was denied by the district court with regard to the plaintiffs' counts alleging race discrimination, conspiracy to violate civil rights, and retaliation in violation of the first amendment (for actions taken after June 11, 1984). For the reasons set out below, we reverse the district court's partial denial of summary judgment and enter summary judgment based on qualified immunity for the counts of race discrimination and conspiracy to violate plaintiffs' civil rights. We also dismiss plaintiffs' claim of retaliation in violation of their first amendment rights for failure to state a claim.

## I.

Fred Rice was appointed Superintendent of the Chicago Police Department by the late Mayor Harold Washington in August 1983. On December 2, 1983, Rice reorganized the top management ("exempt rank") positions of the police department as is customarily done by incoming superintendents.[1] As part of the reorganization, Rice reassigned or demoted twenty-five white officers from the exempt ranks, demoted no black officers and promoted thirteen black officers to the exempt ranks.

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[1] The exempt rank officers are the highest level managers of the Chicago police department. They create and execute police policy in the supervision and direction of over 15,000 police employees.

Plaintiffs filed a five-count complaint in the District Court for the Northern District of Illinois. In Count I, the plaintiffs alleged the demotions violated their rights to due process of law as guaranteed by the fourteenth amendment. Plaintiffs subsequently dismissed this claim voluntarily. Count II of the Second Amended Complaint alleged that the plaintiffs were demoted for "political reasons." The district court granted summary judgment on this claim finding that Rice was entitled to qualified immunity because "it's not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved." In Count III, plaintiffs claim that race was "a substantial or motivating factor" in Rice's decision to demote them. Plaintiffs contend that the demotions of the white officers and promotions of the black officers were carried out pursuant to a plan adopted by Rice based on the officers' race. Rice denies that he made his personnel decisions based on race claiming instead that all his decisions were made to bring into the exempt ranks people that embraced his philosophy and accepted his management style. The district court denied summary judgment on this count finding that "it was clearly established that a public official could not use race for making employment determinations in the positions that then Superintendent Rice made, and so, . . . qualified immunity at this stage will be denied." In Count IV, plaintiffs allege that Rice engaged in a conspiracy to violate their civil rights in violation of 42 U.S.C. § 1985(3). The district court denied Rice qualified immunity on this count holding that "the law was clear in 1983 that all racial discrimination . . . was clearly covered by Section 1985(3) . . . ." The plaintiffs' final claim, asserted in Count V, concerns the "harass[ment] and retaliat[ion] against police officers who have filed federal lawsuits against" Rice in violation of 42 U.S.C. § 1983. On this count, the district judge granted summary judgment on the basis of qualified immunity for Rice's acts up to and including June 11, 1984, when this Court

denied rehearing *en banc* in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir. 1984), *cert. denied*, 469 U.S. 982 (1984). Accordingly, Rice's motion for qualified immunity on Count V was denied for all actions after June 11, 1984, "when it was clearly established [by *Altman*] that retaliation for the filing of a civil lawsuit dealing with a matter of public concern was conduct protected by the First Amendment to the Constitution." Rice appeals the denial of qualified immunity on plaintiffs' counts of race discrimination, conspiracy to violate civil rights, and retaliation (for activities after June 11, 1984) in violation of the first amendment.

II.

The sole issue on appeal is whether Rice is entitled to summary judgment based on qualified immunity. Summary judgment is the proper stage at which to resolve a qualified immunity issue because it best protects "government officials from the costs of trial and burdens of discovery, whenever possible." *Rakovich v. Wade*, 850 F.2d 1189, 1205 (7th Cir. 1988) (*en banc*); *see also Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbit*, 881 F.2d 510 (7th Cir. 1989) (citing *Harlow*, 457 U.S. at 818). Thus, "[t]he general rule of qualified immunity is intended to provide government officials with the ability to 'reasonably anticipate when their conduct may give rise to liability for damages.' " *Anderson v. Creighton*, 483 U.S. 635 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183, 195 (1983)). Correspondingly, the inherent intent of qualified immunity is to protect government officials from nonmeritorious lawsuits.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court enunciated the modern standard to be applied in qualified immunity cases. The Court held that the official's entitlement to qualified immunity "focuses on the

objective legal reasonableness of an official's acts." *Harlow*, 457 U.S. at 819. "In *Harlow*, the Supreme Court eliminated the subjective good faith element from the qualified immunity analysis and held that 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Polenz v. Parrott*, 883 F.2d 551, 554 (7th Cir. 1989) (quoting *Harlow*, 457 U.S. at 818). This Court has also stated in *Rakovich* that "under *Harlow*, an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent. This is because evaluating intent would be a factual analysis, whereas the objective inquiry is a legal question." *Rakovich*, 850 F.2d at 1210. Such an interpretation is consistent with *Harlow's* approval of deciding qualified immunity cases at summary judgment because "[a]n objective analysis is less fact bound than a subjective analysis, making summary judgment a practical and effective means of terminating unnecessary litigation." *Id.*, at 1205. "Thus . . . a qualified immunity analysis entails a purely objective inquiry to determine whether at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented." *Polenz*, 883 F.2d at 554 (citing *Cleveland-Purdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989). It is with such an objective approach in mind that we review this case.

In light of *Harlow*, however, we note that a court's inquiry in applying an objective analysis to a claim that depends on the official's state of mind has not been fully explored by the Supreme Court. *See Benson v. Allphin*, 786 F.2d 268, 276 n.19 (7th Cir. 1986). This case presents such a dilemma, since alleged racial discrimination, violation of civil rights, and retaliation all inherently involve the intent of an official to discriminate. However, this Court has developed an analysis for the proper inquiry to be undertaken. In considering the proper approach in the face of the lack of guidance by the Supreme Court we have warned that:

> [i]t is a mistake to read *Harlow* too broadly. The elimination of intent from the formula does not mean that the *Harlow* Court sought to limit civil rights actions to those where state of mind was *not* a part of the substantive law. . . . *Harlow* merely states that intent must not be *evaluated or weighed* through a factual inquiry, which would reduce the likelihood that qualified immunity could be decided in a motion for summary judgment.

*Rakovich*, 850 F.2d at 1210 (citations omitted). Therefore, despite the apparent paradox, an objective analysis is applicable to situations involving a public official's state of mind. The objective determination in these cases merely requires courts to not consider intent when making the final determination at summary judgment of whether the law is clearly established.

We are further guided in correctly applying the objective standard to this case by the approach taken by this Court in *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986). In *Wade*, we held that *Harlow* calls for the district court to conduct a two-part analysis when state of mind is at issue: "(1) Does the alleged conduct set out a constitutional violation? and (2) were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." *Wade*, 804 F.2d at 70. Thus, when intent is crucial to a party's claim, the court's consideration of intent is relevant to the determination of whether a constitutional violation exists, but not in deciding if the constitutional standard was clearly established. In fact, we stated in *Polenz* that

> where a particular state of mind (e.g., intent, discriminatory motive, retaliatory motive) is an element of the alleged constitutional violation, and the qualified immunity issue arises at the summary judgment or directed verdict stage, in order to answer the step one inquiry, the court must determine whether the plaintiff has factually supported the allegations as to the state of mind element. We made clear, however,

> that the defendant's subjective state of mind is not relevant to the determination of question two.

*Polenz*, 883 F.2d at 554 (footnotes omitted). Therefore, this Circuit has addressed and clarified the ambiguities in the qualified immunity analysis, i.e., "[t]he defendant's subjective good or bad faith is not part of the inquiry." *Id.* at 554 n.3. Having thus examined the relevant legal principles, we now consider Rice's claim to qualified immunity under each of the remaining counts.

## III.

We begin by considering Rice's entitlement to qualified immunity under the plaintiffs' race discrimination claim. Plaintiffs assert, and the district court seemingly found, that intent is a crucial aspect of the entire qualified immunity inquiry. In this respect, the plaintiffs maintain that since Rice does not raise as his defense that he intended to racially balance the exempt ranks, he is precluded from relying on the state of affirmative action law to determine if a constitutional violation was clearly established. The district court apparently accepted this view of the qualified immunity inquiry since it did not consider the state of affirmative action law in determining that "it was clearly established that a public official could not use race for making employment determinations." Therefore, in reaching this decision, the trial court relied on Rice's subjective intent and declined to give adequate weight to the affirmative action aspect of the claim.

We find that such an approach is incompatible with the Supreme Court's holding in *Harlow*. In essence, *Harlow* determined that a subjective inquiry into an official's intent is incompatible with the underlying purpose of qualified immunity, i.e., the ability of government officials to "anticipate when their conduct may give rise to liability for damages." *Davis*, 468 U.S. at 195. In interpreting *Harlow*, this Court has found that when state of mind is at issue, a limited inquiry into intent is relevant in

considering whether there is a constitutional violation but not to see if the law was clearly established. *Wade*, 804 F.2d at 70. Such a limited analysis of intent is consistent with *Harlow* because it does not defeat the official's ability to monitor his conduct.

We follow the guidance from *Wade* and review this question as we do any summary judgment appeal, i.e., we assume plaintiffs' supported allegations as true. *Rakovich*, 850 F.2d at 1210. Under this standard, we conclude that the district court correctly examined the alleged intent in determining that plaintiffs sufficiently alleged a constitutional violation based on racial animus. We must now turn to the second step of the qualified immunity inquiry and determine whether the alleged constitutional violation was clearly established at the time of the alleged violation.

In considering whether the alleged right is clearly established, we must be careful to properly characterize with particularity the right in question. The Supreme Court in *Anderson v. Creighton*, 483 U.S. 635 (1987), defined the necessary specificity to be considered in determining the constitutional right. It emphasized that the identification of clearly established law is not to be applied in broad terms. *Anderson*, 483 U.S. at 639; *see also Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989). The Court determined that allowing plaintiffs to allege violations of broad rights would transform qualified immunity into a rule of pleading. The *Anderson* Court was concerned that by merely pleading a violation of an extremely abstract constitutional right plaintiffs could easily get into court. *Davis*, 468 U.S. at 195. "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Only by defining the right in these terms will a court properly address the major concerns of *Harlow*.

Based on the Supreme Court's holding in *Anderson* and our interpretation of *Anderson* in *Polenz*, *Doe*, *Rakovich*, and *Wade*, we reject plaintiffs' characterization of the clearly established right at issue in this case. Plaintiffs assert that the demotion of the white officers and the promotion of the black officers were actions based on race and were violative of the equal protection clause of the Constitution. However, such a description of the clearly established right rises to the level of generalization that the Supreme Court condemned in *Anderson*[2] because the characterization does not provide a sufficient basis for a reasonable official to understand that what he is doing violates that right, a crucial aspect of *Harlow*. Instead, "the test for immunity should be whether the law was clear in relation to the specific facts confronting the public official when he acted." *Rakovich*, 850 F.2d at 1209 (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987). Then, once the defendant's actions are defined according to the specific facts of the case, this characterization must be compared to the body of law existing at the time of the alleged violation to determine if the particular actions violated the clearly established law. *Id.* at 1209.

We believe that the correct portrayal of the specific right alleged to have been violated involving race in this case is whether a reasonable superintendent of police could have concluded that he could take race into consideration for a limited reorganization of the exempt ranks of the police department. This description of the clearly established right bears a more accurate "relationship to the 'objective legal

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[2] "[T]he right to due process law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 107 S.Ct. at 3039.

reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639. It appropriately eliminates the erroneous application of intent from qualified immunity analysis as required by this Court's decisions in *Polenz*, *Rakovich*, and *Wade*. Therefore, under our characterization of the right we are not precluded from considering the state of affirmative action law merely because Rice lacks the subjective intent to implement an affirmative action plan.[3]

The refusal to consider Rice's lack of intent to racially balance and the corresponding proper consideration of the state of affirmative action law is also consistent with our recent decision in *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989). In *Cygnar*, this Court found that a City of Chicago department head charged with race discrimination for promoting whites and demoting blacks in a one-time reorganization was entitled to qualified immunity based on the state of affirmative action law even though he denied using race as a factor in his decisions. In that decision, we found that the defendants intent was not at issue, but rather the question was whether the law put him on notice that his actions violated clearly established constitutional rights. Only by defining the right at issue in an objective manner, through the elimination of intent, can such notice be achieved. There is no reason we should not adopt an analysis similar to that of our decision in *Cygnar* today.[4]

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[3] Contrary to the dissent's assertion, the majority does not "create what is in effect an affirmative action defense for Rice." Rather, *Harlow* and its interpretations in this Court, discussed more fully in the body of the opinion, mandate that we do not consider a public official's subjective intent. Because such intent is irrelevant, the state of affirmative action law becomes part of our inquiry. Therefore, our affirmative action approach is mandated by accepted principles of law.

[4] The plaintiffs try to distinguish *Cygnar* on the ground that the district court in that case found that the defendant was actually carrying out an affirmative action plan and cryptically testified to

(Footnote continued on following page)

We recognize that there may be an inherent irony to an analysis that considers the state of affirmative action law where the defendant denies he had the intent necessary to initiate an affirmative action plan. However, this is the result we must address under *Harlow* and its interpretations by this Court. As previously stated, *Harlow* requires an objective reasonableness test that does not consider the subjective intent of the defendant. Therefore, whether Rice intended to enact an affirmative action plan is not relevant. Rather, it is the objective reasonableness of Rice's actions in light of clearly established law that must be considered. *See Harlow*, 457 U.S. at 819.

We now turn to the question of whether such a right, in light of affirmative action law, was clearly established as of the time of the alleged violation. We look again to *Cygnar* where this Court reviewed the state of applicable affirmative action law during the same time frame. In that case, we determined that in order for a valid affirmative action plan to be implemented in 1983 there must exist: "(1) some type of statistical disparity between the local labor force and the minority composition of the employer's work force and (2) a time limit on the plan." *Cygnar*, 865 F.2d at 844 (quoting *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981)); *see also Fullilove v. Klutznick*, 448 U.S. 448 (1980). Under this analysis, we believe that a reasonable superintendent of police could have concluded that he could consider race for a limited

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[4] *continued*
that effect, whereas in this case Rice vehemently denies ever considering race. This distinction is not as great as plaintiffs would have this Court believe. In *Cygnar* the defendant denied implementing an affirmative action plan, as does Rice in this case. In any event, any minimal factual distinction is irrelevant under the objective qualified immunity analysis established in *Harlow*. Under this view, Rice's intent is not dispositive of the question of whether the law was clearly established at the time and thus plaintiffs' distinction is meaningless.

reorganization of the exempt ranks as this was not a clearly established constitutional violation at the time the violation is alleged to have occurred.

At the time Rice instituted his transfers, a statistical disparity existed between the exempt ranks and the total police department work force. The exempt ranks of the Chicago Police Department were 83% white, 13% black, and 4% hispanic, whereas the total department work force was 69% white, 27% black, and 4% hispanic. After the reorganization, the exempt ranks were 71% white, 24% black and 4% hispanic.[5] Additionally, the reorganization was a one-time restructuring, thereby satisfying the time limit requirement of *Lehman*. Thus, since Rice's actions meet the *Lehman* requirements that defined affirmative action law in this Court as of 1983, we believe that at that time it was not clearly established that Rice's transfers violated the plaintiffs' constitutional rights. As such, Rice is entitled to qualified immunity on plaintiffs' racial discrimination claim.

## IV.

We turn next to Rice's qualified immunity defense on the plaintiffs' claim of a conspiracy to violate their civil rights under 42 U.S.C. § 1985(3). Rice contends, and we agree, that he is entitled to qualified immunity on this claim as well.

In analyzing this claim, we must apply the same *Harlow* qualified immunity analysis as previously discussed. Accordingly, we accept the allegations of the pleadings as true and turn our attention to whether it was clearly established at the time of the alleged violation that a reasonable superintendent of police could not consider race for

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[5] Although this is not the precise test established in the first prong of *Lehman*, it is a sufficiently similar statistical analysis for a government official to reasonably believe it could be used to foster an affirmative action plan.

a limited reorganization of the exempt ranks of the police department. Such a characterization properly defines the right at issue under the *Harlow* and *Anderson* approaches. We must next examine the relevant case law to resolve whether the right was clearly established. This necessarily includes a determination of whether racially motivated conspiracies against whites are covered under § 1985(3). If it was not clearly established that whites as a class were within the purview of § 1985(3) in 1983, then there is no clearly established constitutional violation.

In denying qualified immunity to Rice on this issue, the district court relied on the language of this Court's decision in *Grimes v. Smith*, 776 F.2d 1359, 1365 (7th Cir. 1985), where we stated that "in *Griffin*, it was made clear that racially motivated conspiracies were prohibited under Section 1985(3)." The district court reasoned that since § 1985(3) prevents racially motivated conspiracies, Rice's reorganization must also be prohibited. However, it does not necessarily follow from *Grimes* that *all* racial discrimination is covered by § 1985(3). Rather, *Grimes* must be read in the light of the Supreme Court's holding in *United Brothers of Carpenters and Joiners v. Scott*, 463 U.S. 825 (1983). Since *Scott* was decided in 1983, it is particularly helpful in determining whether the right was clearly established.

In *Scott*, the Court considered the application of § 1985(3) to a conspiracy by a pro-union group against a group of non-union employees. The conspiracy resulted in a physical attack on the non-union employees, who filed an action for damages under § 1985(3). In addressing these claims the Court decided that the original objective of § 1985(3) was the protection of blacks and their supporters and therefore the action was not proper under § 1985(3). The *Scott* Court, by not recognizing conspiracies motivated by economic or commercial animus, limited the scope of § 1985(3) to cases of racial animus. In its decision, the Court extensively discussed the legislative history and original intent of § 1985(3). Although the Court refused to expand § 1985(3) to actions involving non-racial animus, its discus-

sion regarding the scope of § 1985(3) is particularly relevant in considering whether to expand § 1985(3) to non-blacks. The Court held:

> it is a close question whether §1985(3) was intended to reach any class-based animus other than animus against Negroes and those who championed their cause, most notably Republicans. The central theme of the bill's proponents was that the [Ku Klux] Klan and others were forcibly resisting efforts to emancipate Negroes and give them equal access to political power. The predominant purpose of § 1985(3) was to combat the prevalent animus against Negroes and their supporters.

463 U.S. at 836. After discussing the legislative history of § 1985(3), the Court concluded it would withhold "judgment on the question whether § 1985(3), as enacted, went any farther than its central concern—combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth, and Fifteenth Amendments." *Id.* at 837. *See also Harrison v. Kvat Food Management, Inc.*, 766 F.2d 155, 161 (4th Cir. 1985) (Republicans as a class are not protected by 1985(3)).

After reading *Scott*, it is far from clear whether § 1985(3) extended to protect whites as of 1983. It is well established that "[p]ublic officials are entitled to immunity unless it has been authoritatively decided that certain conduct is forbidden." *Alliance to End Repression v. City of Chicago*, 820 F.2d 873, 875 (7th Cir. 1987). Because we find that the law was not clear in 1983 as to whether § 1985(3) covered whites as a class we cannot say that Rice should reasonably have known that his actions violated the plaintiffs' constitutional rights. Our recent opinion in *Triad Associates, Inc. v. Chicago Housing Authority*, No. 88-1353, slip op. (7th Cir. Dec. 26, 1989), does not mandate a different result. In *Triad*, we expressly determined for the first time that § 1985(3) should extend beyond its "predominant purpose" and cover conspiracies

against whites. This decision fully comports with our holding today, since we do not reach the merits of this claim but merely determine that as of 1983 it was not clearly established that § 1985(3) extended to whites. In fact, *Triad* recognized that the merits of this claim have "not been affirmatively ruled upon by *any* court to date." *Triad*, slip op. at 17 (emphasis added). Since *Triad* is the first decision by any court to precisely address the issue, we are confident in holding that it was not clearly established in 1983 that § 1985(3) extended to whites. In any event, based on *Scott*, the plaintiffs have not met their burden of establishing that the right was clearly established. *See Abel v. Miller*, 824 F.2d 1522, 1534 (7th Cir. 1987). Therefore, Rice is entitled to qualified immunity on this claim.

V.

Turning to Rice's final claim, we review the district court's partial denial of qualified immunity on plaintiffs' cause of action based on an alleged "pattern of harassment and retaliatory treatment by defendant[ ] Rice" since the filing of their complaint. Specifically, plaintiffs allege that Rice engaged in conduct that consisted of retaliatory transfers and a failure to consider them for promotion in violation of their first amendment right to freedom of speech in protecting their right to file this suit. The district court granted summary judgment on the basis of qualified immunity for all acts which occurred on or before June 11, 1984, the date this Court denied rehearing in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). In *Altman*, a police sergeant was reassigned to a less-desirable post after the police chief suspected that the sergeant encouraged another officer to appeal her suspension from the force. After the sergeant filed his complaint, a campaign of harassment was instituted against him. We held that the filing of the sergeant's suit and subsequent retaliation by the police chief were not in violation of plaintiff's first amendment rights be-

cause the speech concerned a private matter rather than issues of public concern. *Altman*, 734 F.2d at 1243-1244.

The district court, in this case, determined that *Altman* clearly established that a lawsuit raising a matter of public concern was speech protected by the first amendment and entitled to protection under § 1985(3). Further findings by the district court determined plaintiffs' suit in this case inherently involved a matter of public concern since it involved a superintendent of police, and accordingly denied Rice qualified immunity after June 11, 1984. Rice claims he is entitled to qualified immunity for acts alleged to have occurred after June 11, 1984, as well, since he alleges that in 1984-1985 it was not clearly established that the first amendment prohibited retaliation for filing a civil rights lawsuit.

In considering this issue the trial court found that there were no cases in 1983 clearly articulating that the mere filing of a lawsuit was an action protected by the first amendment; in fact, the trial court found the case law was to the contrary. The district court concluded the only time a filing of a lawsuit may be protected by the first amendment is when it implicates a matter of public concern. Thus, the trial court identified the threshold inquiry to determine if there was a constitutional right was whether the matter is one of a public or private concern. *See also Altman*, 734 F.2d at 1240.

The district court in the instant case reached its finding by concluding that allegations of race discrimination targeted at a Superintendent of Police of the City of Chicago are inherently matters of public concern and thus denied qualified immunity. *Id.* at 53. However, we find that such a broad analysis is inappropriate. Although it is true that such transfers may be of *interest* to the public, we find that in applying the test established by the Supreme Court in *Connick v. Myers*, 461 U.S. 183 (1983), the actions taken by Rice do not raise an issue of public *concern*. Thus, plaintiffs have failed to state a claim for retalia-

tion and harassment in violation of their first amendment rights to file this lawsuit.[6]

The Supreme Court in *Connick* established the test to determine if an issue involves a matter of public concern. The *Connick* test does not look to what may be conveyed by the employee's speech, but rather, requires a court to look to the reasons the employee is speaking. In *Connick*, an assistant district attorney was fired for insubordination for distributing a questionnaire in the office. The Court, finding that at least one issue in the questionnaire was of public concern, nevertheless concluded the distribution of the questionnaire was essentially an act of insubordination driven by private motive. Therefore, the Court held, the speech involved was motivated solely by private interests. The Court further stated "that when a public employee speaks not as a citizen upon matters only of public concern, but instead as a employee upon matters of only

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[6] As the dissent properly notes in its discussion of this claim, but neglects to accept in its response to our holding regarding plaintiffs' race discrimination claim, intent of the public official is irrelevant to the qualified immunity inquiry of whether a constitutional right is clearly established. However, based on this rule of law, the dissent seeks to show an apparent inconsistency in our use of intent in considering whether this case involves a matter of public concern. The dissent misreads whose intent we are considering. Here we are looking to the intent of the plaintiffs and not the public official, only the latter is barred under qualified immunity analysis. Also, the dissent does not recognize that we do not reach the level of qualified immunity inquiry which precludes us from considering intent in qualified immunity cases. Instead, we find that plaintiffs' first amendment cause of action fails to state a claim since it does not involve a matter of public concern. The consideration of plaintiffs' intent is relevant at this level of the inquiry as determined by the Supreme Court in *Connick*.

Accordingly, because we do not reach the qualified immunity issue, we need not address Rice's claim that it was not clearly established that the first amendment protects the filing of a civil rights lawsuit.

personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick*, 461 U.S. at 147.

We believe that the district court's decision, in the instant case, that this was a matter of public concern, was a misapplication of the law. It does not appear from the record that the trial court took note of, or applied, the *Connick* test. Instead, the court concluded that the mere fact that this case concerns a superintendent of police makes this a matter of public concern. However, "[t]o presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Nonetheless, the district court reached this result in light of *Altman* where it was determined that even though that case involved a chief of police, it was still purely a matter of personal interest.

This Court has adopted a set of questions to be considered in applying the *Connick* test. In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), we decided the essential questions to be considered in deciding this issue are: "was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Linhart*, 771 F.2d at 1010. When answering these questions to determine whether the employee's speech addresses a matter of public concern, the content, form, and context of the statement must be determined as revealed in the whole record. *Connick*, 461 U.S. 147-48.

In *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 419-20 (7th Cir. 1988), we adopted the *Linhart* inquiry and determined that the filing of a lawsuit alleg-

ing retaliation for filing a sex discrimination complaint against a school district was not activity protected by the first amendment because the filing of the suit was not a matter of public concern. The plaintiff in *Yatvin* only "wanted to advance her career, not promote a cause." *Id.* at 419. So too is it apparent in this case that the plaintiffs in filing their complaint were merely challenging their demotions and transfers rather than trying to raise an issue of public concern. They sought to advance their careers and receive compensatory and punitive damages for the alleged wrongs. It was not their central intention to promote a cause of public concern. Race discrimination is a matter of public concern, but the plaintiffs did not seek to debate race discrimination. They were solely interested in advancing their own private employment interests.[7] *See Yatvin*, 840 F.2d at 419-20.

Although the subjective intent of the parties may be difficult for an appellate court to determine, we believe that, as was the case in *Yatvin*, this lawsuit "does not seek relief against *pervasive or systematic misconduct by a public agency or public officials*, and, . . . is not part of an overall effort by the plaintiff[s] . . . to correct allegedly unlawful practices or bring them to public atten-

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[7] The dissent maintains that since this suit was filed against "one of the nation's most important metropolitan police forces" it naturally implicates the public interest. We acknowledge that this case may interest the public, but respectfully suggest that the dissent employs the incorrect focus under the law. The critical issue is whether the suit involves a matter of public *concern*, not simply one of public *interest*. These are two significantly different inquiries. A topic that is of interest to the public may be determined, as the dissent notes, by viewing the local newspapers. However, a matter of public concern must be detected under the test established by the Supreme Court in *Connick* and its interpretations by this Court. Such an analysis requires a determination of the plaintiffs' purpose in bringing this suit, as is discussed more fully in the text.

tion." *Yatvin*, 840 F.2d at 420 (emphasis added). Therefore, we find that the district court incorrectly held that the alleged harassment and retaliation stemming from the filing of the plaintiffs' complaint was a matter of public concern. Since only lawsuits that present matters of public concern may have first amendment protection, and we have determined that this is not such a case, we find that *Connick* mandates the dismissal of plaintiffs' action for failure to state a claim. *Altman*, 734 F.2d at 1244.

## VI.

Accordingly, we hold that, Superintendent Rice is entitled to summary judgment based on qualified immunity on plaintiffs' counts of race discrimination, and conspiracy to violate their civil rights. We also find that plaintiffs have failed to state a claim on their allegations of retaliation in violation of their first amendment rights. Therefore, in accordance with this opinion, we REVERSE the district court on these counts and enter summary judgment in favor of Rice accordingly.

WOOD, JR., *Circuit Judge*, dissenting. This is not an easy case in which to administer the accepted principles of law, with which I have no disagreement, applied by the majority. It is only in the application of those principles to the facts of this case which causes me, in part, to respectfully dissent.

In Count III the eighteen white plaintiff high-ranking police officers charge that they were demoted because of race, and that black officers were advanced to positions which had previously been held by them. Former Superintendent Rice, also a black, absolutely denies his decision was based on race. Rather, he explains it was done only to advance people who embraced "his philosophy," and "accepted his management style." What that philosophy and management style may have been, or how it was determined that these plaintiffs neither embraced or accepted whatever there was to embrace or accept, is not explained. Ability to perform as police officers clearly appears not to have been a factor as Rice stated he had no reason to believe that the replaced plaintiffs would not have continued to do a good job.

The majority agrees, and so do I, with the decision of the district court insofar as it held that the plaintiffs sufficiently alleged a constitutional violation based on racial animus. The next step, however, the qualified immunity inquiry, is where we begin to part company. The majority correctly explains that the right alleged to have been violated must be clearly established at the time and be characterized with particularity. The contours of that right are required to be sufficiently clear to enable a reasonable official to understand that what he contemplates doing may violate that right. The majority rejects plaintiffs' characterization of the clearly established right at issue.

Plaintiffs complain that their demotions and the promotions of the substitute officers were based on race and therefore violated their equal protection rights. That is too general a charge for the majority but not for me when

viewed as it must be in its factual context. As the majority recounts, Rice reorganized the top management of the Chicago Police Department. Twenty-five white officers were demoted although only eighteen of them joined as plaintiffs in this suit. Not a single black officer was demoted, but thirteen black officers and no white officers were promoted to the vacancies created by the white demotions. It seems to me that the top police officer of a large metropolitan police force, considering Rice and others similarly situated, objectively and reasonably would or should have known that what was being done would likely violate a right of the plaintiffs. High police officials are experienced to some extent in legal issues and constitutional rights. More therefore can reasonably and objectively be expected from top police officials than, for instance, from a mere supervisor in some other ordinary government office. Rice and other police superintendents ordinarily have access to legal advice within the municipality. The majority states the issue to be whether a reasonable superintendent of police could have concluded that he could take race into consideration for his reorganization. It seems to me a little more than just "taking race into consideration" when all whites are out and all blacks are in, but that states the issue fairly enough.

The majority then proceeds to create what is in effect an affirmative action defense for Rice, but he made it very plain he claimed none. He had not approached the reorganization on that basis and had done no affirmative action statistical analysis or anything else for affirmative action purposes. In fact, Rice explained that if he had injected any factors other than efficiency and effectiveness into the top command structure, he would have been doomed to failure as a superintendent. Rice not only denies that race was a factor, but offers the explanation that his reorganization only had to do with his own philosophy and style, not race or anything else. The majority, nevertheless, creates for Rice a paper-mache affirmative action defense just for the purposes of granting qualified immunity. In

disagreeing with the majority's qualified immunity affirmative action approach in these circumstances I do not mean or intend to disparage affirmative action in the slightest. I fully support affirmative action appropriately applied. To justify what it does the majority cites a number of cases which we need to examine.

*Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989), is viewed by the majority as its pattern for what it does. In the present case, however, *Cygnar's* significant factual distinctions are discounted. In *Cygnar*, 865 F.2d at 844, this court held that the state of the law at about this same time did not clearly prevent that defendant from transferring those plaintiffs based upon their race to correct what the *Cygnar* defendant perceived to be a statistical under-representation of minorities in the office. Therefore, it was held that the defendant was entitled to qualified immunity as the criteria had been met, perhaps unwittingly, for a valid affirmative action plan under *Lehman v. Yellow Freight Systems, Inc.*, 651 F.2d 520 (7th Cir. 1981). In *Cygnar*, 865 F.2d at 835-36, however, there was evidence to suggest such a course. A very pertinent memo had been sent to his supervisor by the defendant who had instituted the racial transfers. That memo informed his supervisor that he was assuming command of the "affirmative action posture" of his new office. Thereafter in the memo was set out an office personnel listing showing race. In view of the apparent disparity in the listing, that defendant concluded that affirmative action did not exist in the department and that something would be done about it, and it was. A follow-up memo indicated progress in correcting the racial imbalance. As this court noted in *Cygnar* that defendant also testified that he instituted the transfers not because of a discriminatory animus but to bring in people he knew and trusted.

It can, therefore, be seen that in *Cygnar* this court had something factual to go on to objectively support its view, but there is no similar factual support in this present case. A pseudo affirmative action-qualified immunity defense is

manufactured only out of air. The majority supplies Rice with a statistical disparity backup which he did not have, did not use, or even want at the time. It is more than just a matter of Rice's intent, expressed or unexpressed. He offered under oath his only explanation of why he took the official actions that he did. What the majority creates in these particular circumstances, quite apart from Rice's expressed intent, which exonerates Rice without trial is for me just too contrived and artificial.

The *Harlow* objective legal reasonableness standard is the best standard that can be conceived, but I believe it is being unrealistically carried too far in the present factual circumstances. It affords a "reasonable superintendent of police," viewing the matter objectively, more protection than a reasonable superintendent of police at that time should have needed. I would therefore affirm the district court on this count although our approaches to the issue vary somewhat.

Count IV raises the issue of Rice's qualified immunity in the context of an alleged violation of plaintiffs' civil rights under 42 U.S.C. § 1985(3). The majority allows Rice qualified immunity as it is determined that at that time the law was not clear as to whether section 1985(3) covered whites as a class for qualified immunity purposes. I agree with that analysis, and therefore join that part of the opinion.

The final issue is raised by Count V of the amended complaint which alleges a pattern of harassment and retaliatory treatment by Rice, specifically that he subjected some of the plaintiffs to retaliatory transfers and denial of consideration for promotion in violation of their first amendment rights to freedom of speech in protecting their right to file this very civil rights suit. The district court granted summary judgment on the basis of qualified immunity for acts prior to but denied it after the date of our decision in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). *Altman* established that

retaliation for filing a civil law suit dealing with a matter of public concern was conduct protected by the first amendment. *Altman* involved a suit by a single police sergeant complaining about an undesirable reassignment. The sergeant also alleged that he was harassed for encouraging another officer to appeal her suspension from the force. This court held defendant's actions not to be a first amendment violation because plaintiff's speech was only a private internal matter and not a matter of public concern.

I agree with the *Altman* holding, but the present case is much more than that. The majority finds no public interest based in part on *Connick v. Myers*, 461 U.S. 135 (1983). *Connick* involved a single public employee who distributed a questionnaire within his own office. That was considered by his supervisor as insubordination motivated only for a private motive, except with a limited exception, and therefore not protected.

I do not find in *Connick* that the Supreme Court directs us to look only to the reasons the employee spoke out to determine whether there is a matter of public concern or not. *Connick* holds that the employer need not tolerate the employee's insubordination, disruption of the office, and destruction of working relationships. *Id.* at 152. There was no disruption or destruction by the plaintiffs in the present case. No fault was found with them. Also in *Connick* the manner, time, place, and context are found relevant and significant. In *Connick* the plaintiff was transferred based on internal matters, then plaintiff's suit followed. In the present case the alleged retaliation followed from plaintiffs banding together to bring the acts of the superintendent to the attention of the federal court. *Connick* found that the circulated and disruptive interoffice questionnaire touched in part on a matter of public concern because of a single question, among many other irrelevant questions, that inquired about political pressure in their jobs. *Id.* at 149. That *Connick* finding is reached without any finding that the employee's reason for circulating the questionnaire which contained that one question

was only for a public and not a private concern. The Court held it "apparent" that the issue was a matter of interest to the community. *Id.* at 149. In this present case, the majority finds no public interest merely because it finds it was not the central intention of plaintiffs to promote a cause of public concern. Plaintiffs, it is assumed, were only concerned with their own private employment interests. This present case is much more than the *Connick* questionnaires one political question held to be of public concern.

Rice's "intent" in the qualified immunity context is quite properly immaterial, but on the other hand the personal intent of plaintiffs in this context is found by the majority to be the only controlling factor. It is, of course, obvious that plaintiffs have a personal financial interest in this law suit. These white officers held ranks and positions noted by the majority to be "the highest level managers of the Chicago police department, and who helped create and execute police policy in the supervision and direction of over 15,000 police employees." Nevertheless, the majority does not find enough to interest the public in what was done allegedly because this suit had been filed challenging the demotions and promotions for reasons other than merit at the highest level of one of the nation's most important metropolitan police forces. If the public was not concerned about this type of police reshuffling and the alleged retaliation which could impact for better or worse on its safety and welfare, then it should have been, but I think the public was interested.[1]

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[1] It seems, however, that others viewed the police reshuffling as a matter of considerable public interest. When it happened it was a front page story in the *Chicago Tribune* on December 3, 1983. It was reported in a two-page article that the police "department's top commanders got new jobs Friday from Superintendent Fred Rice in the biggest department shake-up in recent history." One of the plaintiffs, Larry Forberg, Commander of the Narcotics Section, is quoted as speaking out strongly against his demotion and

(Footnote continued on following page)

The majority also cites *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), as support for its view, but that is only a case of a disgruntled acting chief of police who tried to maneuver his appointment as the permanent chief. Instead of the appointment he received only a letter of reprimand for his personnel file. I agree with that decision, but it is likewise of little guidance when contrasted with the present factual circumstances. *Yatvin v. Meadesor Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), is also cited by the majority. It is likewise a decision I find no fault with, but again it is so factually distinguishable as to be of little help. *Yatvin* involved the principal of a public school who complained about the denial of two promotions she had sought. She claimed that she lost the first promotion because of her sex and that she lost the second promotion in retaliation for her filing a sex discrimination charge after losing the first promotion. These facts were found not to raise a matter of public concern because, in essence, *Yatvin* made no attempt "to distinguish this case from the run-of-the-mine [*sic*] single-plaintiff discrimination case." 840 F.2d at 420. That situation, however, is far from the present case where a large number of high-ranking white police officers with important public responsibilities were demoted and replaced by black officers, and then were allegedly harassed for filing this federal civil rights suit. There is public significance in this present case because it involves a most important public agency and very sensitive and significant racial changes which could affect the public generally. This case is of much greater public significance than the cases the majority uses as precedents to dispose of it.

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[1] *continued*
transfer. He recited the awards he had been given for his narcotics work by the federal government. Even before it happened it made news in the *Chicago Tribune* as something sources said was about to happen. There was a photograph of Rice. *Chicago Tribune*, Dec. 2, 1983, § 3, at 1, 3. It is not surprising that this police shake-up got public attention from the beginning.

I do not intend to suggest any opinion whatsoever about plaintiffs' allegations on their merits. My view is only that I do not believe that Counts III and V are ready for summary judgment on the basis of the qualified immunity of Rice, or dismissal for failure to state a claim because of the majority's determination that it is not a matter of public concern. The last thing I would suggest is that the federal court just second-guess public officials in the way they administer their offices. Qualified immunity for public officials is an absolutely essential protection for them, but in the way the majority applies it here in Count III it could become more than a shield to protect public officials from the disruption of trials. It could become a shield for the activities of public officials for which they should reasonably have anticipated being later held to answer. As I read *Connick* in regard to Count V it supports plaintiffs. This present case is more than a reflection of "one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre," much more. 461 U.S. at 148. Count V does not deserve to be dismissed.

I would prefer to affirm the district court on Counts III and V, and so to that extent I respectfully dissent.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

May 11, 1990.

Before

Hon. WILLIAM J. BAUER, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD D. CUDAHY, *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*
Hon. JOHN L. COFFEY, *Circuit Judge*
Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. FRANK H. EASTERBROOK, *Circuit Judge*
Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. DANIEL A. MANION, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*

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JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSADINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, JOHN RAFTER, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON and ROGER WHALEN,

*Plaintiffs-Appellees,*

No. 89-1479 *v.*

FRED RICE,

*Defendant-Appellant,*

and

CITY OF CHICAGO,

*Defendant.*

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B. 2

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1224—**James F. Holderman**, *Judge*.

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## ORDER

A majority of judges in active service have voted to rehear this case *en banc*. Accordingly,

IT IS ORDERED that rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on February 6, 1990 be, and are hereby, VACATED. This case will be reheard *en banc* on May 30, 1990 in the morning session.

# APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 89-1479

JOHN AURIEMMA, DANIEL COLL,
MARSHALL CONSADINE, RENALDO COZZI,
KENNETH CURIN, RUSSELL DITUSA,
THOMAS FARAGOI, LAWRENCE FORBERG,
JOHN HINCHY, KATHRYN KAJARI,
GEORGE MARCIN, PATRICK MCDONOUGH,
WALTER MURPHY, JOHN RAFTER,
DOMINIC RIZZI, JAMES STAMPNICK,
THOMAS WALTON, and ROGER WHALEN,

*Plaintiffs-Appellees,*

*v.*

FRED RICE,

*Defendant-Appellant,*

and

CITY OF CHICAGO,

*Defendant.*

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1224—**James F. Holderman,** *Judge.*

ARGUED SEPTEMBER 11, 1989—
REARGUED *EN BANC* MAY 30, 1990—
DECIDED AUGUST 20, 1990

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges*.

WOOD, JR., *Circuit Judge*,[1] joined by CUMMINGS, POSNER, COFFEY, EASTERBROOK, RIPPLE, and MANION, *Circuit Judges*.

This case was brought by eighteen white officers of the Chicago police department who were demoted by defendant Fred Rice, a black former superintendent of the Chicago police department. Plaintiffs claim they were demoted because of their race in violation of the equal protection clause of the fourteenth amendment and 42 U.S.C. §§ 1981, 1983, and 1985(3).

In the original and now-vacated opinion, a divided panel relied on the doctrine of qualified immunity to reverse the district court and enter summary judgment in favor of defendant Fred Rice. *See Auriemma v. Rice*, 895 F.2d 338 (7th Cir. 1990). Now, a divided *en banc* court affirms the district court denying Rice qualified immunity on counts III and V and reverses on count IV where the district court had denied him qualified immunity.

## I.

The late Mayor Harold Washington in August 1983 appointed Fred Rice superintendent of the Chicago police department. On December 2, 1983, Rice reorganized the top management ("exempt rank") positions of the police department. The exempt rank officers are the highest level managers of the Chicago police department; they create and execute police policy in the supervision and direction of over 15,000 police employees. As part of that reorganization, Rice reassigned or demoted twenty-five white officers from the exempt ranks, demoted no black

[1] Portions of this opinion have been adapted from the original panel opinion, with Judge Flaum's very kind permission even though he disagrees with the results reached in parts III and V.

officers, but promoted thirteen black officers to the exempt ranks.[2] It is argued that some reorganization is customarily expected from new superintendents, but it is not argued that it is customary to do so on this allegedly racial basis, at least in the absence of an affirmative action plan. Rice, however, absolutely denies his reorganization decision was based on race. Rather, he explains, it was done only to advance people who embodied "his philosophy" and "accepted his management style."

Plaintiffs, the victims of Rice's reorganization, followed their demotions with their five-count complaint in this case. In count I, the plaintiffs alleged the demotions violated their fourteenth amendment rights to due process of law; plaintiffs subsequently dismissed this claim voluntarily. Count II alleged that the plaintiffs were demoted for "political reasons." The district court granted summary judgment on this claim finding that Rice was entitled to qualified immunity because "it's not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved." This ruling has not been appealed. In count III, plaintiffs allege under 42 U.S.C. §§ 1981 and 1983 that race was "a substantial or motivating factor" in Rice's decision to demote them in violation of the fourteenth amendment. Plaintiffs contend that the white officers' demotions and the black officers' promotions were carried out pursuant to a nonaffirmative action plan, adopted by Rice, but nonetheless based on the officers' races. The district court denied summary judgment to Rice, finding that it was clearly established that a public official making decisions similar to Rice could not use race for making employment determinations. In count IV, plaintiffs allege that Rice engaged in a conspiracy to violate their civil rights in violation of 42 U.S.C. § 1985(3). The district court likewise denied Rice qualified immunity on

[2] Not all the affected white officers joined in this suit.

this count, holding that "the law was clear in 1983 that all racial discrimination . . . was clearly covered by Section 1985(3). . . ." The plaintiffs finally claim, in count V of an amended complaint, violations of their first and fourteenth amendment rights for "harass[ment] and retaliat[ion] against police officers who have filed federal lawsuits against" Rice. On this final count, the district judge granted summary judgment on the basis of qualified immunity for Rice's acts up to and including June 11, 1984, when this court denied rehearing *en banc* in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). Accordingly, Rice's motion for qualified immunity on count V was denied for all actions after June 11, 1984, "when it was clearly established [by *Altman*] that retaliation for the filing of a civil lawsuit dealing with a matter of public concern was conduct protected by the First Amendment to the Constitution."

II.

The issue on appeal is whether Rice is entitled to summary judgment based on qualified immunity. Summary judgment is the proper manner to resolve a qualified immunity issue as soon as possible because it protects "government officials from the costs of trial and burdens of discovery, whenever possible . . . ." *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir. 1988) (*en banc*), *cert. denied*, 109 S. Ct. 497 (1988); *see also Harlow v. Fitzgerald*, 457 U.S. 800 (1982). "Under the doctrine of qualified immunity, public officials performing discretionary functions are protected against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbit*, 881 F.2d 510, 511 (7th Cir. 1989) (citing *Harlow*, 457 U.S. at 818), *cert. denied*, 110 S. Ct. 2560 (1990). Thus, "[t]he general rule of qualified immunity is intended to provide government officials with the ability 'reasonably [t]o anticipate when their conduct may give rise to liability for damages.' " *Anderson v. Creighton*, 483 U.S. 635 (1987) (quoting *Davis v. Scherer*, 468 U.S. 183,

195 (1984)). Correspondingly, the inherent purpose of qualified immunity is to protect government officials from nonmeritorious lawsuits. Were it not for the qualified immunity issue in this case, the disputed race factor in the reorganization would clearly not be appropriate for summary judgment.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Supreme Court enunciated the standard to be applied in qualified immunity cases. The Court held that the official's entitlement to qualified immunity "focuses on the objective legal reasonableness of an official's acts." *Id.* at 819. "In *Harlow*, the Supreme Court eliminated the subjective or good faith element from the qualified immunity analysis and held that 'government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Polenz v. Parrott*, 883 F.2d 551, 553-54 (7th Cir. 1989) (quoting *Harlow*, 457 U.S. at 818). In *Rakovich*, this court has also stated that "under *Harlow* an objective immunity analysis at the summary judgment stage prior to discovery does not include an *evaluation* of intent. This is because evaluating intent would be a factual analysis, whereas the objective inquiry is a legal question." *Rakovich*, 850 F.2d at 1210 (emphasis in original). Such an interpretation is consistent with *Harlow*'s approval of deciding qualified immunity cases by summary judgment because "[a]n objective analysis is less fact bound than a subjective analysis, making summary judgment a practical and effective means of terminating unnecessary litigation." *Id.* at 1205. "Thus . . . a qualified immunity analysis entails a purely objective inquiry to determine whether at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented." *Polenz*, 883 F.2d at 554 (citing *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989)), *petition for cert. filed*, 58 U.S.L.W. 3491 (U.S. Jan. 24, 1990). It is with such an objective approach in mind that we review this case.

In light of *Harlow*, however, we note that the Supreme Court has not yet fully explored a court's inquiry in applying an objective analysis to a claim that depends on the official's state of mind. *See Benson v. Allphin*, 786 F.2d 268, 276 n.19 (7th Cir. 1986), *cert. denied*, 479 U.S. 848 (1986). This case presents such a dilemma, because alleged racial discrimination, violation of civil rights, and retaliation all inherently involve the intent of an official to discriminate. This court, however, has developed an analysis for the proper inquiry to be undertaken. We have cautioned:

> It is a mistake to read *Harlow* too broadly. The elimination of intent from the formula does not mean that the *Harlow* Court sought to limit civil rights actions to those where state of mind was *not* a part of the substantive law. *Harlow* merely states that intent must not be *evaluated or weighed* through a factual inquiry, which would reduce the likelihood that qualified immunity could be decided in a motion for summary judgment.

*Rakovich*, 850 F.2d at 1210 (citations omitted & emphasis in original). Therefore, despite the apparent *Harlow* paradox, an objective analysis is applicable to situations involving a public official's state of mind. The objective determination in these cases requires that courts not consider intent when making the final determination at summary judgment of whether the law is clearly established.

We are more explicitly guided in applying the objective standard to this case by the approach taken in *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986). In *Wade*, we held that *Harlow* calls for the district court to conduct a two-part analysis when state of mind is at issue: "(1) Does the alleged conduct set out a constitutional violation? and (2) Were the constitutional standards clearly established at the time in question? . . . Intent is relevant to (1) but not to (2)." *Id.* at 70. Thus, when intent is crucial to a party's claim, as it is in this case, the court's consideration of intent is relevant to the determination of whether

a constitutional violation exists but not in deciding if the constitutional standard was clearly established. We stated in *Polenz* in applying *Wade* that

> where a particular state of mind (*e.g.*, intent, discriminatory motive, retaliatory motive) is an element of the alleged constitutional violation, and the qualified immunity issue arises at the summary judgment or directed verdict stage, in order to answer the step one inquiry, the court must determine whether the plaintiff has factually supported the allegations as to the state of mind element. We made clear, however, that the defendant's subjective state of mind is not relevant to the determination of question two.

*Polenz*, 883 F.2d at 554 (footnotes omitted).

In *Halperin v. Kissinger*, 807 F.2d 180 (D.C. Cir. 1986), Justice Scalia, just after his elevation to the Supreme Court, addressed this subject of intent in the national security context. He fully discussed the situation when clearly established law makes the act legal or illegal depending upon the intent with which the act was performed. 807 F.2d at 184. We read *Halperin* as being in general agreement with our later case in *Wade*. *See also Martin v. D.C. Metro. Police Dep't*, 812 F.2d 1425, 1433 (where intent is an element of the alleged constitutional offense, the plaintiff must be allowed opportunity to offer proof of defendant's illicit motive), *vacated in part*, 817 F.2d 144, *original opinion reinstated*, 824 F.2d 1240 (D.C. Cir. 1987). In the present case, we are past some of the problems discussed in *Halperin*, because this case had progressed to the point of being set and ready for trial before Rice raised the qualified immunity issue. Defendants, so far as the first prong of *Wade* is concerned, concede in their brief, assuming the truth of the allegations, that the district court was arguably correct in concluding that the plaintiffs sufficiently alleged a constitutional violation based on racial animus. We are left with the *Wade* second step of determining objectively whether that constitutional violation was clearly established at the time.

This circuit has addressed and attempted to clarify the ambiguities and difficulties in the qualified immunity analysis. Having thus examined the relevant legal principles, we now consider Rice's claim to qualified immunity under each of the remaining counts. This court is not divided by what the law is believed to be, but only by the law's application in the circumstances of this case.

## III.

We begin by considering Rice's entitlement to qualified immunity under the plaintiffs' race discrimination claim, count III. It is alleged that the plaintiffs were excellent officers and previously had not been the subject of any complaint or disciplinary action, but to the contrary, all plaintiffs had received numerous awards and commendations from the police department and the city of Chicago. At the time this reorganization was undertaken, Rice advised plaintiffs they had done excellent jobs, served well, and that there were no criticisms. No explanation, however, was given to plaintiffs by Rice for his actions. Plaintiffs allege, however, that race was the unspoken explanation, all in accordance with a plan between the late Mayor Washington and Rice to harass and demote these white officers to make their positions available to black officers.

Almost five years after the case had been instituted and not long before trial was scheduled, Rice belatedly raised his qualified immunity defense by motion for summary judgment. At the argument on Rice's summary judgment motion, the district judge over a two-day period thoroughly explored the immunity issue with counsel. Considering that the trial was scheduled to begin, the district judge orally ruled from the bench denying summary judgment to Rice on the basis of qualified immunity. The district judge noted that a reasonable superintendent who in determining whether the contemplated reorganization was legal would have had to take into account something that Rice claims he did not, and that was race. During the argument, Rice's counsel argued that Rice was being "truthful, not cagey," when he said he did not take

race into consideration. There was then a short general discussion about possible perjury, but the district judge necessarily came to no conclusion whether Rice was being truthful in his denial of racial consideration. Plaintiffs maintained that because Rice denied race was a factor and did not raise an affirmative action defense, he was precluded from relying on the state of affirmative action law to determine if a constitutional violation was clearly established and thereby creating a qualified immunity defense.

The district judge explained that he was considering the allegations of the complaint, looking at the constitutional right specifically alleged as having been violated and looking to "the reasonableness of the action, as to whether a reasonable public official would have known, based upon the law as established at that time, whether the action taken as alleged in the complaint violated a clearly established constitutional right." He concluded that it was clearly established based upon objective criteria, that a public official could not use race for making employment determinations and therefore denied qualified immunity. The ruling of the district court cannot fairly be characterized as based only upon Rice's subjective intent or state of mind, but it appears to be based upon the law applied to the facts alleged and known at that stage of the proceeding. There was admittedly no evidence of any affirmative action plan: no racial analysis had been done, and no affirmative action purpose in any degree was claimed. Faced with these objective facts about the white demotions and black promotions outside any affirmative action context and quite apart from Rice's subjective intent, there was no basis for the district court to proceed to consider the state of affirmative action law.

There is no disagreement in this court that the *Wade* interpretation of *Harlow* is to be applied. It is agreed that intent is crucial to a plaintiff's claim but relevant only in determining whether a constitutional violation exists under part one of the *Wade* approach. Nor is there disagreement in this court that plaintiffs sufficiently alleged

a constitutional violation in their demotions based on racial animus considering at this stage that plaintiffs' allegations are true. The application of the *Wade* step 2, however, is where the court divides, not on the law but in its application to this case. It is accepted that consideration of intent is not relevant in determining if the constitutional standard allegedly breached was clearly established.

We must be careful to properly characterize with particularity the right in question. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Court defined the necessary specificity to be considered in determining the particular constitutional right, emphasizing that the identification of clearly established right is not to be determined in broad terms. *Id.* at 639; *see also Cygnar v. City of Chicago*, 865 F.2d 827, 843-44 (7th Cir. 1989). The *Anderson* Court was concerned that by merely pleading a violation of an extremely abstract constitutional right plaintiffs could easily get into court, proceed to trial, and thwart the good intentions of qualified immunity. *Davis v. Scherer*, 468 U.S. 183, 195 (1984). "It should not be surprising, therefore, that our cases establish that the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. Only by defining the right in these terms will a court properly address the major concerns of *Harlow*.

This court disagrees among itself about whether plaintiffs' allegations that they, high-ranking white officers who were demoted without any just cause or complaint about their professional performance but only because of race so as to make their police supervisory command positions available to be filled by black officers, violated the equal protection clause of the Constitution, and in particular 42 U.S.C. §§ 1981 and 1983. We do not view those allegations to be so general as to run afoul of *Anderson* on the grounds that they do not provide a sufficient basis for a reasonable official to understand what he was doing violates

that right. The test for immunity is whether the law is clear in relation to the specific facts confronting the public official when he acted. *Rakovich v. Wade*, 850 F.2d 1180, 1209 (7th Cir.) (*en banc*), *cert. denied*, 109 S. Ct. 497 (1988). "[E]ach of the federal courts of appeals [has] implied that the defendant's knowledge is to be measured against that of the reasonable person in her circumstances, or the reasonable police officer/prison warden/teacher, etc." Kinports, *Qualified Immunity in Section 1983 Cases: The Unanswered Questions*, 23 GA. L. REV. 597, 618 (1989). In general terms what we have in this case is whether a reasonable police chief of a large metropolitan police force should be able to understand that he could not substitute on a wholesale basis black for white officers in high command positions without some fair cause or reason and certainly not on the basis of racial animus. It is not expecting too much from a reasonable superintendent of police to come to the conclusion that the kind of alleged racial discriminatory action charged here, whether black or white, has not just recently been found to be unsupportable.

It is in effect conceded that race discrimination for race's sake is not to be tolerated in government employment. Writing for himself in a case in which no single justice spoke for the court, *Regents of the University of California v. Bakke*, 438 U.S. 265, 289-90 (1978), Justice Powell wrote in general that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal." Justice Powell, however, agreed with other members of the court that race could be taken into account in the school admission context depending on affirmative action factors. That, in part, explains why the defense in the present case attempts to turn to affirmative action law. There was, however, absolutely no foundation in fact for any affirmative action defense, and none was directly claimed. Whether qualified immunity can be invoked on an affirmative action concept is therefore the issue.

We are urged by Rice to eliminate his subjective intent, whatever in fact it was, from the qualified immunity analysis and consider the state of affirmative action law in 1983, granting qualified immunity on that basis regardless of the absence of any factual basis. There is no claim that there was in existence on an objective, even on a subjective basis, any sort of an affirmative action plan or purpose whatsoever that might have led a reasonable superintendent to believe he was therefore doing something proper, not improper. *Anderson* required only that the contours of the right be sufficiently clear that a reasonable official would understand that what he is doing violates that right. 483 U.S. at 640. The Court then explained the limits on that requirement. Qualified immunity does not protect official action just because the very action in question has not previously been held unlawful. It is only required that in the light of preexisting law the unlawfulness of the action is apparent.

Our case, *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) does not lend itself to application in the present case so as to totally fictionalize the creation of qualified immunity for Rice. *Cygnar* is not a ticket to the land of make-believe. To go beyond the facts of *Cygnar* and spread its reasoning over entirely different circumstances makes a fool of the law. *Cygnar* likewise involved white and black police officers in the City of Chicago Office of Municipal Investigation ("OMI"). When former Chicago Mayor Harold Washington appointed a new director of that agency, the new director quickly conducted a survey of the gender and race of the office staff and reported by memo to his superior on the racial makeup. He advised that "affirmative action concepts do not exist in this department." He further advised that due to constraints on civil career service staff personnel to resolve that imbalance could only be a long-range goal, but as to the police personnel it would be dealt with immediately, and it was. A majority of those who replaced the demoted white officers were black. Rice, also a defendant in the *Cygnar* case, has had his share of legal problems involv-

ing race. The supervisor in *Cygnar* denied racial or discriminatory animus and claimed only that he acted out of a legitimate desire to "bring in his own people." 865 F.2d at 832. However, as a further defense, although an inconsistent one, it was claimed that the supervisor was in good faith attempting to institute an affirmative action plan. This court held the affirmative action defense failed because the city proffered no evidence of past discrimination or statistical comparison establishing a manifest imbalance between the relevant area labor pool of officers qualified to perform sensitive investigations of city corruption, and the present personnel of the agency. The court went on to hold, 865 F.2d at 844, that although the supervisor's conduct may well violate today's constitutional law standards, that there was no case law at the time clearly preventing the supervisor from trying to correct what he perceived to be a statistical under-representation of minorities in his office. We therefore held that the supervisor was entitled to qualified immunity on plaintiff officers' racial discrimination claims.

In *Cygnar*, in contrast to the present case, there was something factually to build on: there appears to have been an embryonic affirmative action plan or purpose even though deficient. But in this present case there is absolutely no evidence factually supportive of an affirmative purpose. The *Cygnar* facts do not exist because Rice has made it very plain there was no affirmative action rationale. The reorganization was not approached on that basis. There is therefore no evidence or claim of any affirmative action statistical analysis, or of past discrimination, or anything else for affirmative action purposes. In fact, Rice explained that if he had injected race and any factors other than efficiency and effectiveness into the top command structure, he would have been doomed to failure as a superintendent. In these circumstances based on the facts of what happened, leaving to one side Rice's subjective intent, there is nothing, except judicial air, upon which to construct for Rice what would be a species of a nonexistent affirmative action for qualified immunity purposes.

We do not see how the correct portrayal of the specific right alleged to have been violated involving race can be correctly characterized, as this court's now-vacated opinion characterized it, as whether a reasonable superintendent of police could have concluded that he could take race into consideration for a limited reorganization of the exempt ranks of the police department. That formulation does not bear an accurate "relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow.*" *Anderson*, 483 U.S. at 639. That formulation, it has been argued, does not preclude the court from considering the state of affirmative action law merely because Rice lacked the subjective intent to implement an affirmative action plan. There is more in the present case than just "taking race into consideration." That formulation of the right does not fit this case although it might fit others.

We believe the issue can be more particularly stated to fit the facts and circumstances of this case as required by *Anderson*. The issue as we see it is "whether in 1983 a reasonable superintendent of a major metropolitan police force could have reasonably concluded that he could reorganize the police department's highest level managers by reassigning or demoting twenty-five white officers from the exempt ranks, but demoting no black officers, and then promoting thirteen black officers into the new vacancies created by the white demotions, all in the total absence of any affirmative action concept or criteria, defective or otherwise."[3]

Race is and has been for a long time a very sensitive issue in this country. No reasonable police chief could have objectively and reasonably concluded that he could do on a wholesale basis what Rice did and not thereby violate the rights of the white officers. Any police chief who thought he could demote and promote only along allegedly clear racial lines could not be a reasonable police chief.

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[3] It is too late on appeal to supply figures of disparity in the exempt ranks, figures Rice did not have, use, or want.

Even Rice acknowledged that if he had injected race into the reorganization he would be doomed to failure as a superintendent. What in fact happened is another matter. The case now goes to a jury so that it can decide whether the plaintiffs' allegations are true.

## IV.

We turn next to plaintiffs' allegations that Rice's actions violated their civil rights under 42 U.S.C. § 1985(3).[4] The district court also denied Rice qualified immunity on count IV.

In analyzing this count, we must apply the same qualified immunity analysis as previously discussed. We again use the same inquiry as framed above to determine if a reasonable superintendent of police of a large metropolitan

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[4] 42 U.S.C. § 1985(3) provides as follows:

> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

force should have clearly known that what he did would violate the rights of plaintiffs. The pivotal question under 42 U.S.C. § 1985(3) is whether it was clearly established in 1983 that whites as a class came within the protection of the statute. If not, Rice is entitled to qualified immunity on this particular charge. So far as the conspiracy requirement is concerned, it is alleged that the demotions of the white officers for the benefit of black officers were part of a plan and agreement between former Mayor Washington, Rice, and other black city employees. The district court concluded its consideration of this count by holding that a public official in Rice's position in 1983 could not reasonably believe that 42 U.S.C. § 1985(3) was only to protect blacks, not whites, from racial discrimination.

Rice argues that the qualified immunity he claims to be entitled to under count III applies to count IV, "[b]ecause it was not clearly established that [Rice's] acts violated the equal protection clause, *a fortiori* it was not clearly established that a conspiracy to commit those acts was illegal." Because we have found Rice not entitled to qualified immunity under count III we might also *a fortiori* find he was not entitled to it under count IV, but the considerations are not the same.

The district judge's view of section 1985(3) is not without foundation. A mere reading of section 1985(3), as adopted in 1871 following the Civil War, does not suggest that it does not mean what it plainly says on its face. Its language extends protections to "any person or class of persons" and to "citizens" without evident distinction, racial or otherwise. It does not mention black or white or reveal on its face that some are entitled and some are not to "equal protection of the laws, or of equal privileges and immunities under the laws." There is also some legislative history that can be selectively extracted which suggests a literal reading of the statutory language is what Congress intended. Representative Rainey, for instance, expressed the desire that the act be construed to protect the humblest citizens without regard to rank, creed, or

color. CONG. GLOBE, 42d Cong., 1st Sess. 395 (1871).[5] Representative Buckley expressed his view that the legislation was not to protect "colored only, but the whites also." *Id.* at 190. Senator Edmunds also gave the statute a very expansive view. *Id.* at 567. Recently, we considered the racial application of section 1985(3) and found that without doubt it covered conspiracies against whites, not just blacks. *Triad Assocs., Inc. v. Chicago Housing Auth.*, 892 F.2d 583, 591-93 (7th Cir. 1989). We need not review here *Triad*'s cogent discussion of the issue. A clear signal in the fourteenth amendment context, though not precedential in this statutory interpretation, came from *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). Both section 1985(3) and the fourteenth amendment provide for "equal protection" of the laws. Justice Powell in *Bakke*, 438 U.S. at 289-90, wrote that "[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color." After that well-publicized decision in 1978, it could be argued no reasonable chief of police could have an objectively reasonable belief that "equal protection" used in one place would mean less when used in another. Our decision in *Triad* should therefore not have come as a surprise. We noted, however, in *Triad*, that the Supreme Court has never held that the statutory language of section 1985(3) was to protect other than blacks. Even without *Triad*, it could be argued that no one could reasonably have believed that the wholesale racial demotions and promotions of public officers as alleged here could be countenanced under the Constitution and the laws of this country, absent an affirmative action effort. That *Triad* comes only in 1989 could possibly be explained that it is simply because only in recent years have blacks gained a rightful share of political power, which can give rise to abuses, whether by black or white. But things are not so simply to be resolved.

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[5] The *Congressional Globe* was the official record of the United States Congress from 1833-1873.

In July 1983, the critical year in the present case, the Supreme Court said, "it is a close question whether § 1985(3) was intended to reach any class-based animus other than animus against Negroes, and those who championed their cause. . . ." *United Bhd. of Carpenters, Local 610 v. Scott*, 463 U.S. 825, 836 (1983). It was the "predominant purpose" of the statute, the Court continued "to combat the prevalent animus against Negroes and their supporters." *Id.* One scholar in 1987 summed up the section 1985(3) situation:

> Even after one hundred and sixteen years, four major Supreme Court opinions, colorful legislative history, and over five hundred lower court opinions, there is probably no other federal statute in such complete disarray, distortion, and confusion as that section of the Civil Rights Act of 1871 now codified at 42 U.S.C. § 1985(3).

McDonald, *Starting from Scratch: A Revisionist View of 42 U.S.C. § 1985(3) and Class-Based Animus*, 19 CONN. L. REV. 471, 471 (1987) (footnote omitted).

Although scholars, lawyers, and judges have not yet resolved all the problems with section 1985(3), including some not pertinent to this case, it is possible that a reasonable police chief could have. But in any event it cannot be said that the law was clearly established in 1983. Rice is entitled to qualified immunity on count IV, thus requiring reversal on that count.

## V.

Turning to Rice's final claim, we review the district court's partial denial of qualified immunity on plaintiffs' cause of action alleging in count V a "pattern of harassment and retaliatory treatment by defendant Rice" since the filing of this complaint. Specifically, plaintiffs allege that Rice engaged in conduct that consisted of retaliatory transfers and a failure to consider plaintiffs for promotions in violation of their first amendment right to freedom of speech that protects their right to file this suit.

The district court granted summary judgment on the basis of qualified immunity for all acts that occurred on or before June 11, 1984, the date this Court denied rehearing in *Altman v. Hurst*, 734 F.2d 1240 (7th Cir.), *cert. denied*, 469 U.S. 982 (1984). In *Altman*, a police sergeant was reassigned to a less-desirable post after the police chief suspected that the sergeant encouraged another officer to appeal her suspension from the force. After the sergeant filed his complaint, a campaign of harassment was instituted against him. We held that the filing of the sergeant's suit and subsequent retaliation by the police chief were not in violation of plaintiff's first amendment rights because the speech concerned only a private matter rather than issues of public concern. *Altman*, 734 F.2d at 1243-44.

The district court read *Altman* to clearly establish, however, that a lawsuit raising a matter of public concern, not merely a private matter as in *Altman*, was therefore speech protected by the first amendment and entitled to protection under section 1985(3). Further findings by the district court determined plaintiffs' suit inherently involved a matter of public concern because it involved the superintendent of police. Accordingly, the district court denied Rice qualified immunity for acts after June 11, 1984. Rice claims he is entitled to qualified immunity for acts alleged to have occurred after June 11, 1984, as well, because he alleges that in 1984-1985 it was not clearly established that the first amendment prohibited retaliation for filing a civil rights lawsuit.

There is no disagreement in this court that the demotions and promotions alleged are of "public interest," but there is disagreement over whether the filing of this suit qualifies under *Connick v. Myers*, 461 U.S. 138 (1983), as a matter of "public concern," not merely public interest, and is therefore entitled to first amendment protection. In *Connick* a staff employee, disgruntled about a proposed transfer, circulated to other employees within that office a questionnaire seeking their views on internal office affairs. The employee was promptly discharged for being

insubordinate and causing office disruption. The Court held there was no first amendment protection for the employee's questionnaire as it was no more than an employee grievance circulated internally and concerning only internal office policy. In *Connick*, the Court noted that the employee did not seek to bring to light any wrongdoing or breach of public trust, and even if the questionnaire had been publicly distributed it would convey no more than the fact that a single employee was upset. *Id.* at 148. First amendment protection was not extended because the employee's speech did not substantially involve matters of public concern. For the Court to have interfered in those circumstances would have been merely to involve itself in office management, which it declined to do. It was explained that because of the enormous variety of fact situations in which these issues might arise it was not feasible to attempt to lay down a general standard to be applied to all situations. *Id.* at 154 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563 (1968)). In each situation the time, place, and manner of the affected speech would be relevant, the court said. *Id.* at 152.

In *Yatvin v. Madison Metropolitan School District*, 840 F.2d 412 (7th Cir. 1988), the plaintiff sought a position with the school district but was not chosen. She then filed sex discrimination charges, applied for another position with the school district, but again was not chosen. This second failure gave rise to her suit claiming retaliation in violation of her first amendment rights for having filed the sex discrimination charges. This court characterized it as "the run-of-the-mine single-plaintiff lawsuit" in which plaintiff sought only her own promotion. No relief was sought against pervasive or systemic misconduct by public officials. Relief was denied. *Id.* at 420. The present case is, however, no "run-of-the-mine single-plaintiff discrimination case," but one of potentially broad impact not only upon the multiple plaintiffs but also upon the public's welfare and safety. In this case the filing of this lawsuit in federal court cannot fairly be characterized as merely these plaintiffs speaking out only about a matter of personal interest. The fact that the plaintiffs also sought

damages for alleged wrongs is not enough to keep Rice's actions from being a matter of public concern. If that be the test, only one not aggrieved could raise a protected matter of public concern, and even the few would-be plaintiffs that could meet this test might find the courthouse door blocked by principles of standing. Even if the plaintiffs themselves viewed their problems as only a personal matter, the test of public concern is more objective. It does not depend entirely on the fact the plaintiffs filed a suit for damages and would benefit but also on the other factors discussed in *Connick*.

It would be difficult to find a matter of greater public concern in a large metropolitan area than police protection and public safety. When there is a wholesale change in the highest police echelons allegedly only on a racial basis and not on merit, whether black for white, or white for black, there cannot but be, and there should be genuine public concern. There was clearly public interest. The reorganization was front page news in the *Chicago Tribune* on December 3, 1983. It must also be a matter of public concern if a group of public employees is allegedly harassed and penalized by supervisors for seeking redress in our federal court system because of their public objection to the alleged racial basis of the reorganization. That would be intolerable even for claims later found to be without merit.

We do not know what the merit of plaintiffs' count V allegations may turn out to be, but that should be decided at trial and not foreclosed by the unjustified grant of qualified immunity to excuse the alleged wrong. Summary judgment for Rice was unwarranted on count V.

The judgment is affirmed on counts III and V. The parties shall bear their own costs. Circuit Rule 36 shall not apply.

BAUER, *Chief Judge*, dissenting. I join Judge Flaum's dissent and write only to suggest that the analysis in Judge Cudahy's dissent does not represent my view of the matter. The dimensions of the problem which my Brother Cudahy thinks may have escaped the attention of the majority and minority on the issue are ones I frankly prefer to miss. I do not believe that a recognition of a "white" or "black" party by a judicial decision is necessary, nor do I think that it is true.

I think it unfortunate that voting proceeds along racial lines all too frequently, but voting has frequently been based on ethnic appeals; I don't doubt that people have voted for Irish candidates, Italian candidates and German or Polish candidates just because of that national identity (or voted against such candidates for the same reason). But that has not prompted the courts or law to recognize an "Irish" party or "Polish" party and designate one or the other as the winner or loser and ascribe the party patronage policy to be based on the ethnic identity of the winner.

The candidates were all members of organized and recognized political parties; indeed, the successful candidates for mayor, black and white, were all members of exactly the same party.

CUDAHY, *Circuit Judge*, dissenting:

I join Judge Flaum's dissent on the race discrimination issue but I write separately both to comment further on affirmative action and to note other dimensions of the problem which were not raised by the parties but which seem clearly relevant.

This is certainly not an ordinary case of affirmative action. It is not, at least from all appearances, the frequently encountered case of a government (usually white-dominated) instituting measures that benefit minorities in order

to remedy past discrimination. But, even assuming that the case presents a real, if unusual, case of affirmative action, Chief Rice did nothing that was clearly unconstitutional given the case law of 1983. Indeed, the state of affirmative action law has been notoriously unclear and in flux throughout the evolution of the doctrine. In the early 1980s, affirmative action law was still really in its infancy. (The first full blown affirmative action case decided by the Supreme Court was the *Bakke* decision handed down in 1978.)

In 1980, for example, the Supreme Court held that the government could use appropriately tailored race-conscious measures to counter the effects of past discrimination. *Fullilove v. Klutznick*, 448 U.S. 448 (1980). And, as late as 1986, the Supreme Court held that public employers may *sometimes* embark upon a race-conscious scheme for remedying past employment discrimination. *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986). Our own case law has been consistent with these Supreme Court dictates. *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989) (citing to *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981)). Hence, a reasonable governmental actor could have taken lawful race-conscious measures in 1983. At least, when viewed as affirmative action, what Chief Rice did was not clearly unconstitutional at the time he acted.

However, I would prefer to try to analyze this situation as something other than a case of affirmative action. Rice denied that he was engaging in affirmative action and the facts do not really fit that mold. This seems to me instead to be very much a political case cast in a racial mold. The 1983 election resulting in the election of Mayor Washington was fought to an extraordinary extent along racial lines, but it was an election nonetheless. Indeed, the political alignment was coterminous with race to a degree having few parallels in electoral history.

" 'Except for the accidents,' " in the words of an involved political consultant, "Washington got all of the black vote." Kleppner, *Chicago Divided: The Making of*

*a Black Mayor* 217 (1985). In fact, in the 1983 general election for mayor, Harold Washington received, according to some estimates, approximately 99% of the black vote and only 12 to 16% of the white vote, with the Hispanic vote split. *Id.* at 218 (Table 23); Levinsohn, *Harold Washington: A Political Biography* 270 (1983). In effect, the blacks won the 1983 election and the whites lost.

The 1983 election was not a traditional Chicago election.

> "It used to be that . . . many people would have chosen sides according to party, and the campaign would be over," [Patrick] Caddell [a political expert] observed shortly before election day. "This time, people also have chosen sides, but the controlling fulcrum here is race not party."

Kleppner, *Chicago Divided* at 236.

The Police Department itself apparently played a significant role in the 1983 mayoral election:

> In the eight days before the April 12th general election, the mayoral race was shaping into a photo finish. In an effort to push Epton [the Republican candidate] over the finish line ahead of Washington, Police Supt. Richard Brzeczek announced his resignation on Tuesday, April 5, exactly one week before the big day. Brzeczek, who had campaigned for [former Mayor] Byrne in the primary, once warned the citizens of Chicago that the streets would not be safe under a Washington administration. The faint of heart were being led to believe that Chicago would become a 20th century Wild West Dodge City under a Black mayor. White police officers, among whom Epton had a great deal of support, expressed regret and anger at Brzeczek's departure. Black officers considered his resignation as a step forward.

Travis, *"Harold": The People's Mayor* 194 (1989). It is in this context of a supercharged political contest waged along starkly racial lines that we must view the controver-

sy before us—not as some sort of sanitized exercise in racial balance.[1]

In this case, Rice, a member of the winning (black) party[2] reorganized his department according to the classic dictates of politics to place more members of the prevailing party in policymaking positions. Since these were upper-rank policy positions the reorganization would not be illegal presumably even under *Rutan v. Republican Party of Illinois*, 58 U.S.L.W. 4872 (1990). Indeed, the district court held Rice to be qualifiedly immune from suit on the claim that the white officers were demoted for "political reasons." The district court reasoned that, under the circumstances, it was "not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved." This ruling has not been appealed. If this is a political case for one purpose, I believe it should be regarded as

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[1] Racist pamphlets involving the police set the tone:

> Handbills were circulated depicting a police insignia that read "Chicongo Po-lease." On the insignia in the center were a pair of lips, a watermelon slice, a can of beer, and a slab of ribs; and the written commentary on the side deprecatingly linked these to black heritage and traditions. Another piece of racist propaganda, *displayed in some of the police stations in white areas*, posed a series of questions emphasizing the danger that with a black mayor, Chicago would become another Gary, Indiana. (emphasis supplied). "No matter what anyone tells you, this election has come down to *race*," it warned. Readers were urged to "make the difference" by voting for Epton and to "make copies" of the handbill "and get the word around."

Kleppner, *Chicago Divided* at 211-212.

[2] Perhaps one should not call the contending organizations "parties"; perhaps "electoral vehicles" would be a more felicitous term. One of these survives even today in a perhaps attenuated form as the "Harold Washington Party." But I think it is generally better that we recognize electoral reality and apply a doctrine that might fit than turn a blind eye to reality in search of convenient conclusions.

a political case for other purposes—including equal protection.

In addition, it should be noted that a violation of the equal protection guarantee requires an intent to discriminate against a particular group—in this case whites. *See Washington v. Davis*, 426 U.S. 229 (1976). There seems to me no such intent on the facts before us. The Supreme Court has held that an intent to discriminate must be a "motivating factor" of the challenged action. *Hunter v. Underwood*, 471 U.S. 222 (1985). The line that prefers blacks and discriminates against whites is so fine that it may be argued with some force that an "intent to discriminate" is not evident here. Rice evidently did not desire to hurt whites; he merely intended to recognize and reward those who had worked, or at least voted, for the victor (and who were "philosophically" compatible with Washington and Rice). Moreover, there is no evidence in the record of any specific "racial animus" involving a desire on Rice's part to demean whites as such. Because this is really a political case and because Rice, in order to benefit members of the "black" party, had—by definition—to take actions that adversely affected whites, I cannot find the requisite discriminatory intent here. In short, Rice acted, not *because* he wanted to hurt whites, but "in spite of" the fact that he was hurting whites. *See Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979).[3]

On the basis of this "political" equal protection analysis, which seems to me considerably more realistic than a conventional affirmative action one, Rice either would be arguably innocent of a civil rights infraction or would have qualified immunity since promotions among policymaking officials after a "black" party political victory did not constitute a clearly established constitutional violation in 1983.

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[3] *See also United Jewish Organizations of Williamsburgh, Inc. v. Carey*, 430 U.S. 144 (1977) (where six justices indicated that it was significant that the legislature *had not intended to injure* white voters when it drew up reapportionment plans that benefited minorities).

FLAUM, *Circuit Judge*, with whom BAUER, *Chief Judge*, CUDAHY, and KANNE, *Circuit Judges*, join, dissenting. I respectfully dissent from the majority's decision because I believe it is contrary to the Supreme Court's statement that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow v. Fitzgerald*, 457 U.S. 800, 817-18 (1982). As the majority correctly notes, this Court is not divided on the law of qualified immunity, but rather on its application when the defendant government official's state of mind is at issue. Specifically, I differ on whether the court should consider the alleged underlying state of mind to determine if there is a clearly established right. The majority injects intent into this analysis, while I believe intent should not be considered in objectively defining the relevant body of law. *See Anderson v. Creighton*, 483 U.S. 635 (1987) (qualified immunity to be applied objectively); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) (objective qualified immunity analysis proper for summary judgment); *Polenz v. Parrott*, 883 F.2d 551, 553-54 (7th Cir. 1989) ("Supreme Court eliminated the subjective good faith element from the qualified immunity analysis"); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427 (7th Cir. 1989) (qualified immunity analysis entails a purely objective inquiry), *petition for cert. filed*, 58 U.S.L.W. 3491 (U.S. Jan. 24, 1990); *Wade v. Hegner*, 804 F.2d 67 (7th Cir. 1986) (intent not relevant to whether constitutional standards clearly established). For the reasons discussed below, I respectfully dissent as to Counts III, race discrimination, and V, retaliation. I concur with the majority's opinion on Count IV, conspiracy.

## I.

My first disagreement concerns the majority's denial of qualified immunity on Count III, the race discrimination claim. Although the majority correctly notes *Harlow's* directive that an objective analysis, one eliminating subjective intent, must be applied in determining whether the constitutional violation was clearly established, it overlooks

the ruling in its application of the law to this case. The *Harlow* Court stated that it "was instituting a new regime of 'reliance on the objective reasonableness of an official's conduct' . . . and that it was generally eliminating '[j]udicial inquiry into subjective motivation.' " *Halpern v. Kissinger*, 807 F.2d 180, 185 (D.C. Cir. 1986) (Scalia, J.) (quoting *Harlow*, 457 U.S. at 817). The Court later confirmed that *Harlow* "purged qualified immunity doctrine of its subjective components." *Halpern*, 807 F.2d at 185 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985)). I fail to see how the majority's application takes these concerns into account.

My approach differs from that of the majority because I believe the right should be defined without considering intent. As the Supreme Court held in *Anderson*, 483 U.S. at 641, inquiry into an official's subjective intent is not part of the *Harlow* qualified immunity analysis. The majority's characterization of the right at issue incorporates the plaintiffs bare allegations of malice and thus sacrifices the "the 'objective legal reasonableness' that is the touchstone of *Harlow*." *Anderson*, 483 U.S. at 639. The majority's approach transforms qualified immunity into a simple rule of pleading, something the Supreme Court has warned against. *Id.* at 639. The right at issue, however, must be defined "in relation to the specific facts confronting the public official when he acted," *Rakovich v. Wade*, 850 F.2d 1189, 1209 (7th Cir. 1988) (*en banc*) (quoting *Colaizzi v. Walker*, 812 F.2d 304, 308 (7th Cir. 1987)), not his underlying state of mind. Accordingly, "under *Harlow*, an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent." *Rakovich*, 850 F.2d at 1210.

To appropriately define the right in these terms, intent must be removed from the analysis. Therefore, I conclude the correct portrayal of the specific right alleged to have been violated involving race is whether a reasonable superintendent of police could have concluded that he could take race into consideration for a limited reorganization of the exempt ranks of the police department. This char-

acterization of the right is more objective than that of the majority, as is required by *Anderson*. Accordingly, the court must consider all the law that the objective facts of the case support to determine whether the right is clearly established. In this context, an objective approach does not preclude a consideration of the state of affirmative action law merely because Rice may have lacked the subjective intent to implement an affirmative action plan.

The majority, in an attempt to demonstrate why the court should not consider affirmative action law, brings Rice's subjective intent into the analysis. Neither *Harlow* nor this Court's decision in *Cygnar v. City of Chicago*, 865 F.2d 827 (7th Cir. 1989), supports the majority's approach. In *Cygnar*, this Court found that a City of Chicago department head charged with race discrimination for promoting blacks and demoting whites in a one-time reorganization was entitled to qualified immunity based on the state of affirmative action law, even though he denied using race as a factor in his decisions. In that decision, we found that the defendant's intent was not at issue, but rather the question was whether the law put him on notice that his actions violated clearly established constitutional rights. We concluded that only by defining the right at issue in an objective manner, through the elimination of intent, can such notice be achieved. The majority attempts to distinguish *Cygnar* on the ground that the district court in that case found the defendant was actually carrying out an affirmative action plan and cryptically testified to that effect, whereas in this case Rice strongly denies ever considering race. This distinction, however, is not as significant as one would be led to believe. In addition, any minimal factual distinction between the cases is irrelevant under the objective qualified immunity analysis established in *Harlow*. Under that approach, the government official's intent is not dispositive of the question of whether the law was clearly established at the time. *See Anderson*, 483 U.S. at 641 (Official's "subjective beliefs about [the action] are irrelevant").

By focusing the decision of this Court on whether Rice intended an affirmative action plan, the majority also is

omitting *Harlow's* announced purpose of early elimination of insubstantial claims at summary judgment. In *Rakovich v. Wade*, 850 F.2d 1189, 1210 (7th Cir. 1988) (*en banc*), we stated that "under *Harlow*, an objective immunity analysis at the summary judgment stage prior to discovery does not include an evaluation of intent. This is because evaluating intent would be a factual analysis, whereas the objective inquiry is a legal question." *Rakovich*, 850 F.2d at 1210. "An objective analysis is less fact bound than a subjective analysis, making summary judgment a practical and effective means of terminating unnecessary litigation." *Id.* at 1205. The majority's approach, however, thwarts this goal. It requires a court to consider intent, inevitably sending more, if not most, cases to trial. I, respectfully, disagree with this outcome. Rather, I believe a court should only look to the objective facts and determine whether the actions violate clearly established constitutional rights; if not, then qualified immunity should be granted. If Rice's actions in this case, therefore, can objectively reflect an affirmative action plan, then he should be entitled to qualified immunity. Intent should not be the controlling factor.

At the time in question, Rice's actions satisfied the requirements in *Lehman v. Yellow Freight System, Inc.*, 651 F.2d 520 (7th Cir. 1981), that "(1) some type of statistical disparity between the local labor force and the minority composition of the employer's work force and (2) a time limit on the plan" existed. *Cygnar*, 865 F.2d at 844 (citing *Lehman*). For these reasons, I would find that Rice's objective actions did not violate clearly established constitutional rights and would entitle him to a grant of qualified immunity at summary judgment.

## II.

I also disagree with the majority's denial of summary judgment for Rice on Count V, the retaliation claim. The threshold inquiry in such a case is to determine whether the matter is one of public, or private, concern. *See Altman v. Hurst*, 734 F.2d 1240 (7th Cir. 1984). I differ with the majority's view that this is a matter of public concern.

The Supreme Court established the test in *Connick v. Myers*, 461 U.S. 183 (1983) to determine when an issue involves a matter of public concern. The *Connick* test does not look to what may be conveyed by the employee's speech, but rather requires a court to examine the reasons the employee is speaking.[1] The Court held the speech involved, distribution of a questionnaire, was motivated solely by a private purpose. In such circumstances, the Court stated, "when a public employee speaks not as a citizen upon matters only of public concern, but instead as an employee upon matters of only personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency." *Connick*, 461 U.S. at 147.

The mere fact that this case concerns a superintendent of police does not make this a matter of public concern. "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case." *Connick*, 461 U.S. at 149. Our decision in *Altman* recognized this principle when we determined that even though the case involved a chief of police, the allegations were still purely a matter of personal interest and not public concern.

In *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985), this Court established a list of questions to be considered in deciding this issue. These are: "was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?" *Linhart*, 771 F.2d at 1010. If the answers to these questions reveal that the dispute was purely a private matter, then the court should dismiss the claim.

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[1] Count V concerns whether the plaintiffs have stated a first amendment claim. It is appropriate to consider the plaintiffs' intent, not the government official's, to decide this question under *Connick*.

In *Yatvin v. Madison Metropolitan School Dist.*, 840 F.2d 412, 419-20 (7th Cir. 1988), we applied the *Linhart* questions and determined that the bringing of a lawsuit alleging retaliation for filing a sex discrimination complaint against a school district was not activity protected by the first amendment because the lawsuit was not a matter of public concern. The plaintiff in *Yatvin*, we determined, only "wanted to advance her career, not promote a cause." *Id.* at 419.

So, too, it is apparent in this case that the plaintiffs in filing their complaint were primarily challenging their demotions and transfers rather than trying to raise an issue of public concern. They sought to advance their careers and receive compensatory and punitive damages for the alleged wrongs. It was not their central intention to promote a cause of public concern. As was the case in *Yatvin*, the plaintiffs' action "does not seek relief against *pervasive or systematic misconduct by a public agency or public officials*, and, . . . is not part of an overall effort by the plaintiff[s] . . . to correct allegedly unlawful practices or bring them to public attention." *Yatvin*, 840 F.2d at 420 (emphasis added). Race discrimination is a matter of public concern, but the plaintiffs did not seek to debate race discrimination, they were solely interested in advancing their own private employment interests.

III.

For the above stated reasons, I would reverse the district court's denial of summary judgment on Counts III and V. I concur with the majority's opinion on Count IV.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*

# APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 1224 Date: March 6, 1989
Name of Assigned Judge: JAMES F. HOLDERMAN
Case Title: Auriemma et al v City of Chicago, et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Plaintiffs' oral motion to dismiss Count 1, dismiss the Chicago Police Department as party defendant and dismiss the Estate of Harold Washington is granted. Defendants' motion for summary judgment is granted in part and denied in part.

* * * * *

(12) ☒ (For further detail see ☒ order on the reverse of the original minute order form.)

(Reserved for use by the Court)

ORDER

84 C 1224

Plaintiffs' request for injunctive relief is moot as to defendant Rice. On Count 2, defendant Rice's motion for quali-

fied immunity is granted. On Count 3, defendant Rice's motion for qualified immunity is denied. On Count 5, defendant Rice's motion for qualified immunity is granted up to and including June 11, 1984 when the Seventh Circuit denied rehearing in the *Altman* case. Defendant Rice's motion for qualified immunity on Count 5 is denied for the period of June 12, 1984 on when it was clearly established that retaliation for the filing of a civil lawsuit dealing with a matter of public concern was conduct protected by the First Amendment to the Constitution.

D. 3

[1] [1] IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JOHN AURIEMMA, et al., | ) | |
| | ) | |
| Plaintiffs, | ) | 84 C 1224 |
| | ) | |
| v. | ) | |
| | ) | Chicago, Illinois |
| CITY OF CHICAGO, et al., | ) | March 6, 1989 |
| | ) | 2:08 p.m. |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

APPEARANCES:

For the plaintiffs:

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For the defendants:

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[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

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HENRY F. FIELD,
Special Assistant Corporation Counsel,
MATTHEW J. PIERS,
Deputy Corporation Counsel,
PHILLIP L. SNELLING,
Assistant Corporation Counsel,
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Chicago, Illinois 60601

* * * * *

[10] THE COURT: * * * Moving then to defendant Rice's motion for summary judgment on the basis of qualified immunity, I note at the outset, of course, that the complaint seeks damages and injunctive relief from former Police Superintendent Rice and, of course, qualified immunity doesn't provide any protection against injunctive relief, but Mr. Rice is no longer the Superintendent of Police, so he is without any authority to provide the plaintiffs with the injunctive relief that they seek.

What is the plaintiffs' position on that point? Doesn't that make the injunctive relief moot?

MR. GUBBINS: That would make it, as far as Superintendent Rice, not as far as the City, of course, but as far as Superintendent Rice.

THE COURT: All right, then, the request for injunctive relief as to defendant Fred Rice is moot.

Looking at Count 2, Count 2 of the Amended Complaint charges Fred Rice with demoting the plaintiffs because they supported candidates for mayor other than the person who was ultimately elected at that time, Harold Washington.

Paragraph 51 of the Second Amended Complaint states:

> "Plaintiffs' demotions from their positions [11] "within the upper ranks of the Chicago Police Department were ordered by defendants Washington and Rice to

punish them for their failure to support Washington in his campaign for mayor and to make room for appointments of Washington supporters in those positions."

I guess the real crux of the qualified immunity analysis and the crystallization of the issues in connection with that was set forth, I thought, most clearly in Wade v. Hegner from the Seventh Circuit in 1986, 408 F.2d 67, and I'm referring counsel to page 70 of that opinion and, really, it's a two-issue analysis, the first issue being does the alleged conduct set out a constitutional violation, and the second issue being were the constitutional standards established at the time; in other words, was the constitutional right that was asserted by the plaintiffs clearly established so as to alert the public official that the right is clearly established and therefore a violation of that right would subject the public official to damages.

The Seventh Circuit en banc in Rakovich v. Wade, 850 F.2d 1180, at 1209, enunciated the test as follows. The test really is, "whether the law is clear in relation to the specific facts confronting the public official when he acted."

I realize there were some dissents and some concurring opinions in connection with the enunciation of [12] that issue, dissenting from Judge Wood's opinion in the Rakovich case, but under this analysis, I believe on Count 2 there are two reasons why Fred Rice is entitled to qualified immunity.

The first is that I conclude, without deciding the issue of whether or not Fred Rice's conduct in transferring and demoting the plaintiffs amounts to a constitutional violation, and on this issue, the recent Seventh Circuit case in Rutan v. Republican Party, which was handed down on February 16th of 1989—that case strongly suggests, I believe, that the conduct alleged here does not consti-

tute a constitutional violation, but separate and apart from that, the constitutional standards were certainly not clear and established in December of 1983 at the time that Mr. Rice took the action that he took.

By 1983 it had been decided—and I'm referring to Delong v. United States, 621 F.2d 619, Fourth Circuit, 1980—that case had been decided, limiting the Branti and Elrod protection to employment decisions resulting in dismissals or in "constructive discharge."

Now, I realize that it's the plaintiffs' argument that removal from their exempt positions, from the plaintiffs' exempt positions, without cause or a hearing is substantially equivalent to dismissal. Plaintiffs set forth that argument in their response brief on page 9. But I believe [13] that this argument does not preclude summary judgment in favor of Fred Rice on the qualified immunity basis.

It was not clear in 1983 what constituted a constructive discharge, and when the Seventh Circuit even in the Rutan case just a few weeks ago was attempting to articulate what degree of coerciveness and disruptiveness and loss of financial resources is necessary to a finding that a transfer or demotion amount to a constructive discharge, the Seventh Circuit still was attempting to decide that particular question.

The plaintiffs have not provided sufficient evidence that their return to their career ranks imposed such a burden upon them as employees of the City of Chicago that it would have led a reasonable employee in their positions to quit. That's the test that was enunciated in the Rutan case regarding constructive discharge.

In short, I believe that the state of the law is as yet undecided as to what liability, if any, is incurred by a government official who takes adverse employment action that involves loss of rank and pay but falls short of dis-

missal or constructive discharge, because it's the constructive discharge and the dismissal that are indicated that there's a—that the action taken by the public official is constitutionally prohibited. And at least this issue remained undecided in 1983.

[14] Therefore, Fred Rice's actions as far as Count 2 is concerned I believe did not violate a clearly established constitutional right. Consequently, Mr. Rice is entitled to qualified immunity on Count 2.

The other reason why I believe that Mr. Rice is entitled to qualified immunity on Count 2 is that under the Branti analysis, it's not a constitutional violation to make employment decisions based upon political affiliations when party affiliation is an appropriate requirement for effective performance of the public office involved.

It wasn't clearly established in 1983 that the plaintiffs did not fall within the parameters of the term "confidential employee"—and I put "confidential employee" in quotes. Basically, I'm following what the Seventh Circuit determined with regard to 1984 in the Cygnar case as to the OMI employees.

Just being nonexempt from the Shakman decree did not put Rice on notice that political affiliation wasn't a proper criterion. And I certainly don't believe in 1983 that Mr. Rice was on notice, because even the District Court here in the Herron case, Herron v. City of Chicago, at 591 Fed. Supp. 1565, decided in 1984, had not made it clear that employment actions beyond discharge were covered by that consent decree.

Consequently, I think at that time a public [15] official in the position of Mr. Rice was free to permissibly evaluate the positions that the plaintiffs were removed from as confidential, and I believe that that's a further basis for why Mr. Rice should be accorded qualified immunity under Count 2. These plaintiffs were within the top 100

employees of the Police Force. And I'm not sure that even now we could find that they were not confidential employees within the meaning of that term as it has been interpreted, and it certainly wasn't clear in 1983.

So, consequently, as to Count 2, Mr. Rice is accorded qualified immunity.

Moving on to Count 3 as to Mr. Rice, the Second Amended Complaint states that race was a substantial and motivating factor in Mr. Rice's decision to demote the plaintiffs.

* * * * *

[37] * * * THE COURT: All right, looking specifically at the allegations of the complaint, and I have to consider all of the allegations of the complaint, which does not articulate anything with regard to disparity among the exempt ranks as to the racial makeup of those exempt ranks, I must look to the constitutional right that is specifically being alleged to have been violated and look to the reasonableness of the action, [38] as to whether a reasonable public official would have known, based upon the law as established at that time, whether the action taken as alleged in the complaint violated a clearly established constitutional right.

Taking into account the allegations of the complaint as they are set forth in the complaint, and taking into account the constitutional right as articulated by the plaintiffs, I believe that it was clearly established that a public official could not use race for making employment determinations in the positions that then Superintendent Rice made, and so, consequently, as to Count 3, qualified immunity at this stage will be denied, and, of course, the case law has indicated that this determination should be made in advance of trial based upon objective criteria so, consequently, applying those objective criteria, I believe it was clearly established, and I believe that the right

was specifically established at that time that employment decisions could not be made on the basis of race. Consequently qualified immunity as to Count 3—the motion for summary judgment on the basis of qualified immunity will be denied as to Fred Rice.

* * * * *

[51] * * * THE COURT: * * * As it stands right now, and as indicated by plaintiffs' counsel, there are now four plaintiffs [52] who allege retaliatory harassment under count 5 of the complaint, and the issue as to Mr. Rice's qualified immunity with regard to the retaliatory harassment claim, the plaintiffs claim there was a pattern of retaliatory transfers and failure to consider plaintiffs for promotion.

Once again I have to make the analysis under qualified immunity, was there a clearly established constitutional right that is alleged to have been violated by the plaintiffs.

In reviewing the case law in connection with this issue, and applying the case law and dealing specifically with the specific fact situation, and the articulation of the established right, the decision that most closely follows or mirrors the allegations is the decision of the Seventh Circuit in Altman v. Hurst at 734 F.2d 1240, which the Seventh Circuit decided on May 18th of 1984, and denied rehearing on June 11th of 1984. Of course, the complaint was filed in February of 1984.

The plaintiffs allege that this was a continuing activity on the part of the defendants. I could not find a case clearly articulating that the filing of a lawsuit was an action protected by the First Amendment and, in fact, I think the case law is that the mere filing of an action is not protected by the First Amendment. You must look to the subject matter of the lawsuit in determining whether

it's a [53] matter of public concern or a matter of private concern.

Of course, the Altman case, the decision in the Seventh Circuit, was that in that case, which was filed by a police officer, and the allegation was retaliation for encouraging the filing of a lawsuit, that the matter was of private concern, and so, consequently, did not allow for First Amendment constitutional protection.

Looking at the subject matter of this lawsuit, which is an allegation that the Superintendent of Police impermissibly used race as a criterion in making promotions and demotions in December of 1983, I believe does raise a matter of public concern. I think any public official at the time, in December of 1983, would believe that an allegation of race discrimination would be a matter of public concern if that allegation of race discrimination is targeted at the Superintendent of Police of the City of Chicago.

Consequently, although the Seventh Circuit in the Altman case affirmed the district court decision to dismiss based upon the fact that the matter was a private concern in that case, I must make a case-by-case factual analysis from the standpoint of whether the right as articulated was clearly established.

I believe certainly by the time that the Seventh Circuit, on June 11, 1984, made its determination to deny rehearing in the Altman case, thus presenting the Altman [54] case as a case which established the law of this Circuit, I believe at that point it was clearly established that a lawsuit raising a matter of public concern was speech protected by the First Amendment, and that retaliation for that conduct would violate First Amendment constitutional rights.

So, consequently, applying that, I'm going to accord former Superintendent Rice qualified immunity up to and including the date of June 11, 1984, but deny qualified immunity after that date in connection with the issues and the actions he took with regard to Count 5, and so that will be the operative date with regard to the evidence as to Count 5, anything after June 11, 1984.

* * * * *

# APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Case Number: 84 C 1224 Date: March 7, 1989

Name of Assigned Judge: JAMES F. HOLDERMAN

Case Title: Auriemma et al v City of Chicago, et al

* * * * *

DOCKET ENTRY:

(1) ☐ Judgment is entered as follows:

(2) ☒ [Other docket entry:]

Defendant Rice's motion for reconsideration of the denial of qualified immunity as to him on Count 3 is denied. Defendant Rice's motion for summary judgment for qualified immunity as to Count 4 is denied per remarks made in open court.

* * * * *

E. 2

[1] [1] IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSIDINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARRAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON, and ROGER WHALEN, | ) | Docket No. 84 C 1224 |
| Plaintiffs, | ) | Chicago, Illinois March 7, 1989 10:30 o'clock a.m. |
| -VS- | ) | |
| CITY OF CHICAGO, HAROLD WASHINGTON, CHICAGO POLICE DEPARTMENT, and FRED RICE, | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

APPEARANCES:

For the Plaintiffs:

John L. Gubbins and Associates, Ltd.
by: JOHN L. GUBBINS and
LINDA FRIEDMAN

For the Defendants:

Law Offices of Earl Langdon Neal
by: EARL LANGDON NEAL and
D. RAINELL RAINS

Dr. Henry F. Field

Deputy Corporation Counsel
by: MR. MATTHEW J. PIERS

Assistant Corporation Counsel
by: MR. PHILLIP SNELLING

* * * * *

[24] * * * THE COURT: I believe that the analysis should be fact specific in determining whether the plaintiffs have alleged a clearly established constitutional violation. And based upon this record and the undisputed facts construing the facts in the light most favorable to the nonmoving party, as I must on a motion for summary judgment, I believe that the plaintiffs have made out a clearly established constitutional violation which was clearly established in December of 1983. And so consequently, the motion of the defendants for reconsideration, the issue of qualified immunity as to Fred Rice on Count III, is denied.

* * * * *

[34] [1]

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| JOHN AURIEMMA, DANIEL COLL, MARSHALL CONSIDINE, RENALDO COZZI, KENNETH CURIN, RUSSELL DITUSA, THOMAS FARRAGOI, LAWRENCE FORBERG, JOHN HINCHY, KATHRYN KAJARI, GEORGE MARCIN, PATRICK MCDONOUGH, WALTER MURPHY, DOMINIC RIZZI, JAMES STAMPNICK, THOMAS WALTON, and ROGER WHALEN, | ) | Docket No. 84 C 1224 |
| Plaintiffs, | ) | Chicago, Illinois March 7, 1989 2:00 o'clock p.m. |
| -VS- | ) | |
| CITY OF CHICAGO, HAROLD WASHINGTON, CHICAGO POLICE DEPARTMENT, and FRED RICE, | ) | |
| Defendants. | ) | |

TRANSCRIPT OF PROCEEDINGS
BEFORE THE
HONORABLE JAMES F. HOLDERMAN

[1] Numbers in brackets refer to the Court Reporter's original pagination of the Transcript of Proceedings.

APPEARANCES:

For the Plaintiffs:

John L. Gubbins and Associates, Ltd.
by: JOHN L. GUBBINS and
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For the Defendants:

Law Offices of Earl Langdon Neal
by: EARL LANGDON NEAL and
D. RAINELL RAINS

Dr. Henry F. Field

Deputy Corporation Counsel
by: MR. MATTHEW J. PIERS

Assistant Corporation Counsel
by: MR. PHILLIP SNELLING

* * * * *

[35] * * * THE COURT: Good afternoon again.

All right, with regard to the issue that was pending, we were addressing, at the time that we broke, which is Count IV, the Section 1985(3), claim of conspiracy, just to make sure the record is clear, it is my ruling that as to the political discrimination claim, which is specifically set out as a substantive constitutional violation under Count II, that Mr. Rice had qualified immunity or should be accorded qualified immunity. And so, consequently, that qualified immunity for that constitutional violation extends onto the conspiracy claim under Section 1985(3). And so really the conspiracy charge that can be presented to the jury can only be based upon allegations of racial discrimination. I assume that everyone understood that before.

MR. GUBBINS: That's correct.

THE COURT: Do you understand, Mr. Gubbins?

MR. GUBBINS: I believe so, your Honor, yes.

THE COURT: All right. The opinion in Grimes versus Smith, which was cited by defense counsel this morning, [36] Judge Eschbach's opinion, dealing with the Supreme Court authority in Griffin and Scott stated not only in the sections specifically referred to by Mr. Neal this morning, but stated on page 1365 of that opinion, of course, that's at 776 F 2d 1359, the particular page I'm referring to now is 1365, the first full paragraph, about half-way down that paragraph, Judge Eschbach wrote, "In Griffin it was made clear that racially motivated conspiracies were prohibited under Section 1985(3)."

That seemed to me to be a statement of Judge Eschbach's opinion as to the clarity of Griffin.

The language on the following page, to which defense counsel has referred, states as follows: "The import of both Griffin and Scott is that the legislative history of Section 1985(3) does not support extending the statute to include conspiracies other than those motivated by a racial, class biased animus against 'Negroes and their supporters.' "

Judge Eschbach in that opinion, following the language I have just quoted, which is on page 1366, in the right-hand column, went on to state, and I believe this is the holding of the Court in that case, "Thus, we join the conclusion of the 4th Circuit in Harrison that Section 1985(3) does not reach nonracial political conspiracies."

Judge Eschbach in the Grimes versus Smith case had a footnote to that holding, Footnote 12, the last paragraph [37] of which states, "Our holding today does not, of course, disturb our prior decisions in which we held that both conspiracies animated by both racial and political motives were within the scope of Section 1985(3)." And

cited as an example, the Quinones case, which plaintiffs' counsel referred to this morning.

It seems to me that the comment made by Judge Eschbach as to the history behind the Griffin and Scott decisions dealt with the concept of conspiracies which had as their object racial animus. It seeks to me today, in looking at the decision by Judge Eschbach in Grimes versus Smith, that Judge Eschbach was not stating that only racial discrimination against blacks was the violation that could be presented by an allegation under Section 1985(3).

I think in order to, for a public official in the position of Superintendent Rice, in December of 1983, when he took the action that he took, for a public official to believe, a reasonable public official in the position of Mr. Rice, in 1983, to believe that only racial discrimination against blacks was covered by Section 1985(3) would be an unreasonable position. I believe the thrust of Section 1985 was to cause all racial discrimination which was effectuated through conspiratorial conduct to be a violation.

I believe that the language that was presented and the language which I have referred to, which states, "to [38] include conspiracies other than those motivated by racial, class biased animus against 'Negroes and their supporters,' " to be dicta within that decision in explaining the history behind the Griffin and Scott cases and the holdings in those cases.

So consequently, I'm going to deny the application of qualified immunity as to Mr. Rice with regard to the Section 1985(3) claim, because I believe that the law was clear in 1983 that all racial discrimination as opposed to any other type of discrimination, such as, political, economic, or other, was clearly covered by Section 1985(3), and I believe that that was clear in the year 1983. And so consequently, the motion for summary judgment as to Count IV under qualified immunity as to Mr. Rice will be denied.

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